IN THE

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

Civ. No. B. 025920
(Super. Ct. No. C420153)

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Plaintiff-Appellant,

and

MARY SUE HUBBARD,

Intervenor-Plaintiff-Appellant,

-against-

GERALD ARMSTRONG,

Defendant-Respondent.

ON APPEAL FROM SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
JUDGE PAUL G. BRECKENRIDGE, JR.

APPELLANTS' BRIEF

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INTRODUCTION

This appeal is from an extraordinary judgment that threatens basic constitutional and common law rules governing relations between individuals, corporations and voluntary associations. Defendant, after leaving his position as archivist of plaintiff Church, obtained numerous highly confidential Church archives, converted them to his own unauthorized use and disseminated them to others. Plaintiffs initially brought this suit to regain possession--and protect the confidentiality and privacy--of those documents, and to obtain damages. Because the documents were returned to the Church in December 1986 pursuant to a partial settlement agreement, plaintiffs presently seek reversal and nominal damages, to ensure that their rights and reputation are protected.

The court below found that plaintiffs had established prima facie cases of conversion, breach of fiduciary duty, intrusion into privacy, and breach of confidence. Rather than granting plaintiffs' prayers for injunctive relief and proceeding to assess damages, however, the trial court proceeded to transform this relatively simple conversion and intrusion upon privacy case into a heresy trial of plaintiffs' religion. The court permitted defendant to call as witnesses apostate Scientologists whose testimony had nothing to do with the dispute in issue, but rather with their own disputes with both the alleged actions and the religious beliefs, practices and doctrines of their former Church. The testimony of such witnesses was admitted, in large part, not for its truth, but rather purportedly to show the state of mind of the defendant, despite the fact that the defendant did not know many of the witnesses or of the matters about which they testified until long after he engaged in the acts of intrusion and conversion upon which the action was founded. The trial court ultimately wrote an opinion which not only denied plaintiffs the relief to which they were entitled, but attacked the Church, the religion, and its Founder based upon the irrelevant, distorted and, in many instances, invented testimony of such witnesses. Indeed, the trial court itself became so inflamed with passion and

prejudice that it made gratuitous "diagnostic" findings that the Founder of the religion and the entire Church were paranoid and schizophrenic, based wholly on the evidence which was not admitted for its truth and which the plaintiffs therefore were not permitted to disprove.

The vehicle by which the trial court permitted the case to degenerate in the above-described manner was the court's adoption of defendant's defense that he was justified in his conduct because he believed, whether correctly or not, that the documents might be useful to defend himself against a lawsuit he feared plaintiff would file, and against other unspecified retaliation.

The lower court's decision eviscerates fundamental principles and policies upon which basic rules of property, fiduciary, and privacy law are based. If upheld by this court, that decision will grant broad license to disaffected employees, business associates, clerks, family members and others unilaterally to seize, convert, and disclose highly confidential and private documents of any person or corporation, on the subjective belief that it will serve their personal advantage. By such means, the concept of "outlaw" would be reintroduced, thereby fostering self-help and reducing respect for and compliance with the law.

Both the procedure and the conclusions of the lower court are wrong under universally followed legal precedent. The trial court's novel and dangerous creation of new defenses and improper procedures must be rejected in the strongest terms. Equally, the trial court's gratuitous wholesale condemnation of the precepts and beliefs of an entire religion must be stricken.

Statement of the Case

Proceedings Below

Plaintiff Church, a religious organization, initiated this action on August 2, 1982 (App. 1). The Church alleged that defendant was a former staff member who had been assigned to a special "archives project," which involved maintaining various letters, documents, artifacts and other materials in plaintiff's possession concerning L. Ron Hubbard, the Founder of the religion of Scientology. Some of the materials were to be made

available to Omar Garrison, an author who had been retained to write an authorized biography of Mr. Hubbard, subject to limitations upon disclosure of information as directed by Mr. Hubbard or the plaintiff. Defendant assumed a fiduciary duty to maintain the confidentiality, privacy and physical integrity of the archives materials and of the information contained in them.

The Church further alleged that defendant worked on the project for two years, until December 1981, when defendant converted to his own use certain of the original archives materials, as well as photocopies made on Church premises with Church equipment and materials while he was still a staff member; and that defendant disseminated those materials to unauthorized individuals.

The Church sought return of the documents, including all copies; preliminary and permanent injunctive relief against further dissemination or disclosure of the materials or the information; imposition of a constructive trust over the property and any profits that defendant may have received from his use of them; and damages for the cost to the Church of recovering the documents.

On August 3, 1982 the Church moved for a temporary restraining order and a preliminary injunction. (App. 20) 1/ The Church asserted that it was the rightful owner of the bulk of the documents taken by defendant, and that it was the rightful possessor, as bailee, of the remainder of the documents, which belonged either to Mr. Hubbard, or to his wife, Mary Sue Hubbard. On August 24, 1985, Superior Court Judge Cole issued a temporary restraining order requiring Armstrong to surrender the documents to the possession of the Clerk of the Superior Court, under seal, and providing that the documents could be viewed only by attorneys of record for use in the pending case. (App. 57) Judge Cole further restrained defendant

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1. References to "App." refer to "Appellants' Appendix in Lieu of Clerk's Transcript," which was filed with the initial brief on appeal in this case. References to "S. App.," refer to Appellants' Supplementary Appendix In Lieu of Clerk's Transcript," which is filed together with the present brief on appeal.

from duplicating the documents or disclosing or disseminating them or the information contained in them. On September 24, 1982, the temporary restraining order was converted into a preliminary injunction. (App. 61)

On November 29, 1982, Mary Sue Hubbard was granted leave to file a complaint in intervention. (App. 64) She alleged that she retained an ownership or possessory interest in many of the documents taken by defendant, and that numerous documents were of a highly private and personal nature relating to her or her husband, and were kept for safekeeping by the Church. She sought injunctive relief requiring return of the documents and prohibiting defendant from disseminating the documents or the information. She also sought damages for the invasion of her privacy.

Defendant Armstrong filed an answer to the Church's complaint on September 17, 1982, (App. 99), and an answer to Mrs. Hubbard's complaint on January 5, 1983. (App. 114) Defendant asserted, inter alia, that while working on the archives project he was not employed by the Church but rather by Mr. Hubbard, that the materials in question were either his property or Mr. Garrison's, and that he was justified in taking and disseminating the materials to inform the public of certain facts about Mr. Hubbard and the Church. Mr. Armstrong also filed a counterclaim for damages against the plaintiff Church alleging, inter alia, fraud and intentional infliction of emotional distress. (App. 152) Following several demurrers, which were sustained with leave to amend, a third amended countercomplaint was severed from the underlying complaint.

On April 16, 1984, the case was assigned for trial to Superior Judge Paul G. Breckenridge, Jr. Plaintiffs presented motions in limine to prohibit defendant from introducing into evidence the content of the sealed archives documents on the grounds of irrelevance, privacy, hearsay and First Amendment. (App. 231, 237)[2/] Plaintiffs emphasized that introduction of the

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2. Plaintiffs did not intend to, and did not, introduce the documents to prove their claims of conversion, breach of fiduciary duty and confidence, and intrusion into privacy.

documents into evidence would violate the very right of confidentiality and privacy which they sought to protect by bringing the action. Plaintiff also sought an order that the documents remain under seal during the trial and that the contents of the documents be discussed only in camera. (App. 241.)

The court denied the motions in limine, on the basis of defendant's purported justification defense. (R.T. 125-135)[3] The court also granted defendant's motion for leave to amend his answers to allege the affirmative defense of unclean hands on the injunctive claim, (R.T. 325), despite the fact that that defense had been stricken three times in pretrial proceedings. (App. 127, 147, 151)

Trial commenced on May 3. Plaintiffs called several witnesses, and introduced into evidence the deposition testimony of defendant and of Omar Garrison. At the conclusion of plaintiffs' case, defendant moved for a directed verdict. The court denied the motion, and ruled that plaintiffs had established, by a preponderance of the evidence, an intrusion on privacy, breach of confidence, breach of fiduciary duty and conversion by the defendant. (R.T. 1384)[4]

Defendant called several witnesses, including himself. Defendant acknowledged his limited authority to use the materials, as well as the confidential and private nature of the materials. Defendant's case, directed primarily at proving his justification and unclean hands defenses, presented wide-ranging accusations about the life of Mr. Hubbard and the development of the plaintiff Church.

Rather, they intended to, and did, establish the confidential and private nature of the materials through the admissions of defendant in his deposition testimony. Plaintiffs were careful not to take steps which would compromise the privacy rights which they sought to protect.

3. The court's shifting versions of that defense are described infra at Point II.

4. The evidence establishing the elements of each of plaintiffs' claims is described infra at Point II.

At the end of trial, the court entered into evidence and unsealed, over plaintiffs' objection on grounds of relevancy, hearsay, privacy, and First Amendment privilege, hundreds of documents taken by Armstrong.[5/] (R.T. 4555-690) On June 20, the court issued its Memorandum of Intended Decision (App. 251), which was converted into a Statement of Decision on July 20 (App. 278). Judgment was entered August 10, 1984 (App. 279) Plaintiffs' first Notice of Appeal was filed August 23, 1984 (App. 282).

In its Statement of Decision, (App. 251), the trial court found that plaintiffs established prima facie cases on their four claims, but denied any relief on the basis of defendant's justification and unclean hands defenses. The court formulated the justification defense as defendant's reasonable belief that he was threatened with harassing lawsuits and with physical danger. The court quoted, but did not discuss, five legal authorities in support of that formulation.

The trial court's decision vehemently denounced the character of Mr. and Mrs. Hubbard, but did not state which evidence in the trial record supported which defense as to which of the four causes of action. The court simply attached defendant's pre-trial Statement of Facts as an appendix to its Decision, again without citing--and apparently without regard to--evidence actually adduced at trial.

Plaintiffs appealed from the trial court's judgment on the ground that, as a matter of law, defendant had no justification defense and therefore plaintiffs were entitled to damages; that, as a matter of law, defendant established no unclean hands defense, and therefore plaintiffs were entitled to immediate return of their archival property; that, in ordering the unsealing of the private documents, the trial court defied legions of cases holding that courts could not, in such a perverse fashion, damage the very privacy interests sought to be

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5. Due to several appellate and collateral orders, however, the documents remained under seal until they were returned to the Church pursuant to the partial settlement agreement in this case.

protected by a privacy action; and that, in any event, a new trial was required because the trial court admitted and explicitly considered massive amounts of highly prejudicial and inadmissible evidence. On appeal, the parties filed extensive briefs--totalling nearly 300 pages in length--and full oral argument was held on September 18, 1986.

On December 11, 1986, pursuant to a partial settlement agreement, the trial court issued orders dismissing with prejudice respondent's cross-complaint, and ordering the return of all documents to appellants (S. App. 1). The partial settlement agreement did not settle appellants' underlying complaints for damages for intrusion upon privacy, conversion, and breach of fiduciary duty and confidence.

As part of the partial settlement agreement between plaintiffs and defendant which led to the trial court's dismissal of defendant's cross-complaint, plaintiffs stipulated that in any further proceedings on the remaining claims against defendant "the total damages awarded to the Plaintiff Church of Scientology of California and Plaintiff in Intervention Mary Sue Hubbard, combined for any and all causes of action, shall not exceed twenty-five thousand and one dollars ($25,001.00)." (S. App. 5) Concurrently, Church attorneys Earle C. Cooley and Lawrence E. Heller executed an indemnity agreement in which they conditionally agreed to jointly indemnify Michael J. Flynn, defendant's attorney of record, for any amount he might reimburse Armstrong, not to exceed twenty-five thousand dollars.[6/] (S. App. 6-7) The combined effect of the stipulation

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6. Attorneys Cooley and Heller agreed to indemnify Flynn if all of the following should occur: 1) On appeal this Court should reverse the trial Court's decision in the present case and remand for a retrial; 2) any part of the case is retried and damages are sought by the plaintiffs; 3) judgment is entered in favor of the Church of Scientology and against Armstrong; 4) Armstrong pays any or all of the judgment for damages; and 5) Michael J. Flynn reimburses Gerald Armstrong for any part of the monies paid by Armstrong to the Church pursuant to that judgment. The indemnity agreement guarantees that under those circumstances Cooley and Heller will indemnify Flynn. (S. App. 6-7)

and indemnity agreement effectively limits a potential transfer in damages from Armstrong to the Church to one dollar.

Meanwhile, on December 18, 1986, the Court of Appeal dismissed appellants' appeal on the ground that the judgment appealed from was not an appealable final judgment. (S. App. 8-21) The Court of Appeal reasoned that, under the one-final-judgment rule, there would be no appealable final judgment until judgment was rendered on respondent's cross-complaint. (The Court of Appeal was apparently unaware that respondent's cross-complaint had in fact already been dismissed, since the dismissal was not mentioned.)

Appellants therefore filed a new notice of appeal (the instant appeal) on the basis of the trial court's December 11, 1986 order fully dismissing respondent's cross-complaint. In order to protect themselves against the risk of loss of their right to appeal altogether, appellants also filed a petition in the California Supreme Court, seeking review of the Court of Appeal's dismissal of their initial appeal. Review was denied on March 11, 1987. (S. App. 23)

Neither side, of course, appeals from so much of the final judgment as dismissed respondent's cross-complaint, since that dismissal was ordered pursuant to the parties' partial settlement agreement. The only issue raised in the instant appeal are appellants' challenges to the trial court's denial of relief on appellants' complaints for damages. The trial court's orders of December 11, 1986 rendered moot all issues pertaining to appellants' claims for equitable relief and to the sealing of the documents in question.

Statement of Facts

A. Plaintiffs' Case

1. Background of L. Ron Hubbard, the Church of Scientology, and the Archives Documents.

Plaintiff Church of Scientology of California is a non-profit California religious corporation. (R.T. 507). For eleven years, defendant was a member of the "Sea Organization," a fraternal religious order within the Scientology movement. (R.T. 508, 693)

Plaintiff Mary Sue Hubbard was the wife of L. Ron Hubbard, who was the Founder of the religion of Scientology, and the author of the scriptures of the Church. (R.T. 509) Mr. Hubbard died on January 24, 1986.

The Hubbards were married in 1952. (R.T. 821) From 1969 until May, 1981, Mrs. Hubbard held the position of Controller for the Church of Scientology of California, with supervisory responsibility for the Church's temporal affairs. (R.T. 823)

2. Deposition Testimony of Gerald Armstrong.[7]

Defendant joined the Church of Scientology in 1969 when he enrolled in an introductory Scientology course. (R.T. 692) From 1971, he was a member of the Sea Organization and worked full time for Scientology until December 12, 1981, when he resigned his Church staff position and terminated his relationship with the Church. (R.T. 692, 693)

In January, 1980, he submitted a petition directed to L. Ron Hubbard, through plaintiff Church's organizational channels, asking that he be assigned "to handle research for your biography and related projects" and to gather and preserve "R [L. Ron Hubbard] val[uable] doc[uments] and writings." (Ex. F). The petition was approved, and Mr. Armstrong assumed the Church staff position[8] of LRH Personal Public Relations Office Researcher.

Mr. Armstrong immediately began removing more than twenty boxes of material from storage on Church property at Gilman Hot Springs. These private materials, which related to the first years of the Hubbards' marriage and to Mr. Hubbard's

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7. Plaintiffs established all the elements of their causes of action through the deposition testimony of Gerald Armstrong, which was read into the record.

8. Defendant claimed that he did not work for the Church, but rather worked directly for L. Ron Hubbard. Therefore, plaintiffs introduced disbursement vouchers for living expenses of Mr. Armstrong (R.T. 512-13, Ex. 6) and purchase orders issued by the Church for expenses incurred by Mr. Armstrong for the archives project, (R.T. 516-17, Ex. 9), as well as documents showing he understood he worked for the Church. (Ex. 48, 54, R.T. 2196f.)

life dating back to the 1920's, had been packed by Mrs. Hubbard in 1959, and were stored by the Church ever since. (R.T. 703-04, 824) Later, when Mrs. Hubbard was no longer on Scientology staff, Mr. Armstrong gathered private materials related to the Hubbards' lives during the 1960's; access to these materials had formerly been under the exclusive control of Mrs. Hubbard. (R.T. 707-10).[9/] Finally, defendant obtained many of Mr. Hubbard's personal secretary files dating from the 1970's. (R.T. 707-08).[10/]

The materials collected by Mr. Armstrong were considered extremely confidential by him and others in the Church, not only because they related to Scientology's Founder, but because they were personal and private. The materials included personal letters, diaries, self-analyses, journals, family memorabilia and financial documents. Rigorous precautions were taken to ensure their safety. (R.T. 736-38) Written policy, of which Mr. Armstrong was aware, required that all original Scientology archival materials be handled carefully and never be removed from archives. (R.T. 2281-83, Ex. 35.) These original materials were invaluable documents for the history and development of Scientology as well as highly valuable in the commercial collector's market. (R.T. 1622, Ex. 36)

In October, 1980, Omar Garrison entered into a contract with AOSH DK Publications, a Scientology publishing

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9. Tom Vorm, who was responsible for the Controller's Archives, testified that he was very reluctant to give any materials to defendant, particularly because he was unable to reach Mrs. Hubbard for authorization. He allowed defendant to take documents only on the assurance that the materials were necessary to provide background information for the biography, that they would be used only for this purpose, that their privacy would be protected, and that the documents would be returned after Mr. Garrison was through with them. (R.T. 559-560)

10. Defendant acknowledged that some of the archive materials belong to Mary Sue Hubbard. He also recognized that Mrs. Hubbard had authority to take anything from the archives that she desired and that no one other than the Hubbards had that right. (R.T. 719-20, 724-25)

company, to write an authorized draft biography of L. Ron Hubbard, the contents being subject to the final approval of Mr. and Mrs. Hubbard. (R.T. 722-23) The Church of Scientology assigned defendant to assist Mr. Garrison in these efforts. (R.T. 721-22) He thereupon began providing archives materials to Mr. Garrison. Defendant was fully aware that the confidential documents provided to Mr. Garrison were solely for purposes of preparation of the biography. (R.T. 724-25, 727-30)[11/]

After making a decision to leave the Church, but before actually departing on December 12, 1981, defendant copied as many as 10,000 pages of documents. (R.T. 743, 3270) Defendant left half these pages in the archives, and provided half to Mr. Garrison. Mr. Armstrong also took a great deal of original material. (R.T. 745-46)

After defendant left the Church, he became increasingly hostile toward it and Mr. Hubbard. At the end of April, 1982, defendant made contact with Michael J. Flynn, who was known to defendant as a Scientology antagonist and as the primary attorney handling over a dozen lawsuits against the Church and the Hubbards, claiming hundreds of millions of dollars in damages. In early May, 1982, defendant showed Flynn two of the archive documents, one of which was the original of a 1953 letter from Mrs. Hubbard to Mr. Hubbard, a letter defendant himself characterized as particularly private and personal. (R.T. 756-57)

In May, 1982, defendant prevailed upon Omar Garrison to provide him archives materials, so that he could use them as "evidence" in an unnamed lawsuit he anticipated with the Church, although he had not been sued by the Church and had no idea what he might be sued for. (R.T. 760) In fact, defendant admitted that his purpose was to acquire materials to turn over to Mr. Flynn for use in other litigation against the Church and the

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11. Similarly, Mr. Garrison considered the documents confidential and provided only for biography use. His general practice in Scientology projects was to maintain the confidentiality of documents provided him and return them when the project was completed. (R.T. 1196-97)

Hubbards; this is exactly what he did between May and August, 1982. (R.T. 4579, 764-65, 771-72)

In late May, 1982, at the Bonaventure Hotel in Los Angeles, defendant presented to Mr. Flynn thousands of pages of private and personal archives materials, both originals and copies, including private naval records and Mr. Hubbard's private diaries dating from the mid-forties.[12] (R.T. 776-78) Several former Scientologists, now hostile to the Church, were also present and examined the materials.[13] (R.T. 769) Mr. Armstrong told Mr. Flynn and others that the archives materials were potential evidence in Mr. Flynn's litigation against the Church and the Hubbards (R.T. 770-71).

Thereafter, defendant began sending Mr. Flynn archives materials in large quantities. Between June and August, he sent 3000 pages of original archives materials and 5000 pages of copies of archives materials. (R.T. 722) He also sent about 2000 pages of original archives and 400 pages of copies to local attorneys associated with Mr. Flynn. (R.T. 773-774) Indeed, defendant continued the process after the instant lawsuit was filed. (R.T. 779)

Defendant acknowledged that the archives documents which he misappropriated were private, personal and confidential; that he had no authorization to use them as he had; and that he did not believe that either Mr. or Mrs. Hubbard would ever have approved of the use he made of them. (R.T. 724-32, 765)

3. Additional Plaintiffs' Evidence

a. Through his Scientology career, including while he was archivist, defendant was an employee of and paid by the Church. (R.T. 512-17)

b. Omar Garrison made no claim to have the right of possession of any archives materials. (R.T. 1254-55)

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12. These diaries were so exceptionally private that the trial court refused to allow them into evidence. (R.T. 4602-3)

13. Defendant also showed the private journals and other materials to third parties on other occasions. (R.T. 752-54, 795-97).

c. Letter demand was made on defendant on May 26 and 27, 1982 to return all archives, but he denied having them. (R.T. 1147, 1149; Ex. 17, 18, 19) Defendant's own subsequent testimony showed that he indeed did possess the documents on those dates. (R.T. 756-797)

d. The Church, through its counsel, retained a private investigator's firm to determine what materials defendant had. The investigation was terminated upon defendant's delivery of the materials to the Superior Court, pursuant to the temporary restraining order. (R.T. 1151-152) The Church incurred substantial monetary loss by having to retain investigators. (R.T. 1151-1152, Ex. 21)

e. Mary Sue Hubbard did not consent to defendant's acquisition and dissemination of personal materials of fifty years of her husband's and her lives. She considered his conduct an outrageous intrusion into her and her husband's private lives. (R.T. 843-44)

B. Defendant's Case

In his defense case, defendant contested factually only two parts of the plaintiffs' case. He claimed (1) that he had not been a Church employee, but rather L. Ron Hubbard's, and (2) that Mrs. Hubbard was aware that as archivist he was gathering personal materials (but he did not claim she was aware of or consented to his post-church activities). The bulk of defendant's case was a presentation of why he was "justified" in taking the documents and why the church and Mrs. Hubbard had unclean hands. Defendant's testimony--which filled nine trial days--amounted to a litany of Mr. Armstrong's regrets for his years in Scientology, and opinions he now held about how Scientology and Mr. Hubbard misled and mistreated people.

The trial court also permitted other former Scientologists to testify about their experiences with Scientology, even where those experiences were unknown to, and unconnected with, Mr. Armstrong. The court admitted this testimony, as well as a vast range of hearsay testimony, on the theory that it was relevant to establishing Mr. Armstrong's state of mind. The trial court's decision extensively and

explicitly relied on the truth of such testimony although it had not been admitted for its truth.

1. Defendant's Testimony

a. The Archive Assignment

Defendant's petition to become archivist cited his "fabulous personal gains and success" from Scientology and concluded that "this is the best way I can serve [L. Ron Hubbard]." (Ex. F)

Sometime after he assumed his position, his superiors noticed that defendant's performance was unsatisfactory and that he appeared to be increasingly hostile to the Church and to Mr. Hubbard. On November 24, 1981, a senior staff member requested defendant to discuss these matters, and to follow a non-confidential Church procedure to determine whether he felt unacknowledged hostility to Scientology. Although defendant refused these requests he testified that he considered them an attack on him, and concluded that people were trying to take over the biography project and that Scientology was "nothing but an intelligence organization." (R.T. 1678-79)

Despite defendant's hostility to the Church, he formally maintained his Scientology post in order to get the archives materials--which defendant felt were damaging to Mr. Hubbard and the Church--out of the Church and to Mr. Garrison, where defendant believed he would have access to them. (R.T. 1681, 2286) In the weeks before leaving the Church, defendant copied the same number of documents as he had copied the whole previous year. (R.T. 1653) Finally, he moved his belongings from his room in the Scientology complex, took thousands of pages of original archives materials which he had been unable to copy, and on December 12, 1981, left a note that he had left the Church. (R.T. 1680)

b. Defendant's Activities After Leaving the Church

Defendant tried to justify taking the documents for his own use and providing them to others on the basis of his

purported fear of lawsuits and other retaliation by the Church.[14]

He placed great weight on the fact that he was the subject of a Scientology "declare," which is a document setting forth that a parishioner is in bad standing with the Church because of violations of Church policy. The first "declare," which was issued in February, 1982, but which defendant learned of toward the end of April, noted that defendant had showed hostility toward Scientology and senior Scientologists, and had not followed proper procedure in leaving his post. (R.T. 1699, Ex. PP)

Defendant claimed that the "declare" meant that he was automatically subject to a purported Church policy (the "fair game doctrine") allowing him to be harassed. (R.T. 1705)[15] But the only incident which he was able to raise as purported evidence of "fair game" prior to his unauthorized acquisition and delivery of the documents was a minor dispute with the Church over possession of some photographs. In April 1982, an independent dealer in L. Ron Hubbard memorabilia delivered to the Church a set of photographs of defendant's wedding and another set of photographs that had been taken from the Church by other former Scientologists. The Church returned the wedding photographs to defendant, but retained the other photographs on a bona fide claim of rightful possession. (R.T. 2926, 4253-55)

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14. Aside from the circularity of his testimony--he took the documents to prevent retaliation for his taking the documents--Armstrong admitted that he voluntarily returned to the Church on various occasions and voluntarily had several meetings with Scientology representatives at or near the Church's Los Angeles facilities. (R.T. 1698, 2304-05, 2319, 2324)

15. The meaning and existence of "fair game" was the subject of considerable testimony at trial, with defendant and his witnesses claiming that his version of the policy was accurate, and with rebuttal witnesses, including an expert on religion, explaining that it was a religious doctrine denying Scientology antagonists access to the internal Scientology justice system, which operates analogously to that of the role of the traditional Jewish rabbinate in resolving legal disputes between Jews. In any event, the Church demonstrated that the policy was revoked in 1969 (Ex. AAAA, R.T. 3361-93 and passim).

After defendant made extremely hostile and vehement demands for return of all the photographs,[16] his former wife told him that he should get a lawyer if he wanted to pursue the matter. (R.T. 1713-14, 4258)

Although there was no physical abuse or threat in this exchange, defendant claimed that this single incident led him to fear for his present wife's safety. (R.T. 1715) He decided to "confront" the Church, and contacted Michael Flynn a day or two later. (R.T. 1715)[17]

The only other incident that defendant claimed demonstrated wrongful conduct against him--alleged "harassment" by the Church's private investigators who were seeking information as to the stolen archives--occurred after he had already delivered all of the documents. (R.T. 2446)[18]

c. Defendant's Testimony Concerning The Documents He Took.

Defendant testified for two days about a small portion of the documents that he took. At the explicit suggestion of the trial court about how to frame his defense and

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16. Defendant intended to sell the photographs commercially for several hundred dollars. (App. 275)

17. According to both defendant's pretrial declaration and the Statement of Facts in his trial brief--adopted by the trial court--he learned of a second "declare" in late May, after the Bonaventure meetings and after seeing Mr. Garrison to acquire more documents. (R.T. 2386) At trial, defendant changed his story in an attempt to conform the facts to his new theory that he needed the documents to defend himself against the charges in the second "declare"--he now claimed that he knew of the second declare at an earlier date. (R.T. 1723) In any event, he pointed to no conduct by the Church prior to acquiring and delivering the documents except the photograph controversy described above. And, neither scenario constitutes a legal justification for his conduct. See Argument II, infra.

18. In any event, the evidence as to whether the investigators in fact harassed defendant is, at best, confusing. By defendant's own testimony, on one occasion, he ran up to the investigator's car and began taking their pictures (R.T. 1728); on a second, in order to prevent them from driving away he put his leg in front of their car (R.T. 1726, 2448) As to the third occasion, defendant first testified that he ran after the investigator's car, which swerved and struck him on the elbow, but later testified that he struck the car. (R.T. 2452)

how to testify about the documents (R.T. 1799), defendant stated that he took each document based on his subjective belief that it would be useful in his "defense" of an unspecified lawsuit he feared the Church would file against him.[19] That belief was purportedly based on his further belief that various documents showed that the Church and/or Mr. Hubbard had misrepresented Mr. Hubbard's background, accomplishments, and role in the Church.[20] Defendant admitted, however, that he knew of no present or planned lawsuit in which such matters would be raised. (R.T. 2371)

2. Testimony of Other Defense Witnesses.

The testimony of defendant's nonparty defense witnesses related, first, to Mr. Armstrong's state of mind after leaving the Church, and, second, to purported bad practices by the Church.

Omar Garrison, Nancy Dincalci, and Joyce Armstrong testified that defendant from the time he left the church, was "mentally crippled," completely preoccupied with his hostility toward the Church and unable to get a job or function normally, (R.T. 3692), "violently" disturbed (R.T. 3607), "virtually incoherent," "maniacal," (R.T. 3642), "disturbed," and "confused." (R.T. 3534) This testimony established that

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19. Defendant presented and testified about only 20-25% of the documents that he took. On cross-examination, plaintiffs, after making clear that they were doing so only because the court, over their objection, had allowed testimony concerning the documents, cross-examined defendant with about 50 further documents for the purpose of establishing that his rationale for taking the documents did not even colorably explain the whole body of materials. In order to preserve the documents' privacy, plaintiffs did not present the remaining documents, nor did defendant (presumably because their scope and breadth undermined his defense).

20. This testimony is described infra at 23, n. 25.

The trial court repeatedly and explicitly ruled that defendant's justification defense rested only on defendant's subjective belief that the documents would be useful in defense of unspecified litigation or harassment. On a number of occasions, the trial court ruled that the actual truth or falsity of plaintiffs' alleged misrepresentations and abuse was not on trial. (E.g., R.T. 1799, 1805, 4602)

defendant's extreme hostility toward the Church existed from the time he left the Church, long before the late April dispute over the photographs, which defendant claimed justified his conduct.[21]

Defense witnesses also testified to a variety of alleged bad practices by the Church.[22] The trial court admitted this testimony--much of which was hearsay--on the ground that it was corroborative of defendant's state of mind, even though defendant had no knowledge of these purported facts when he took the documents.

ARGUMENT

SUMMARY

The trial court ruled that plaintiffs established prima facie cases of invasion of privacy, breach of fiduciary duty, breach of confidence, and conversion. The court's grant of judgment to defendant was improper in two principal respects.

a. The trial court committed massive evidentiary errors, which prejudiced the court against the plaintiffs and deprived them of a fair trial. The bulk of evidence adduced by defendant was (1) hearsay evidence introduced solely to prove defendant's state of mind and (2) evidence of alleged abuses committed by plaintiff against third parties, also introduced to prove defendant's state of mind. The trial court improperly considered the former evidence for its truth. And the latter evidence was patently irrelevant to defendant's state of mind because it was indisputably unknown to him at the time he took the private documents. These massive evidentiary errors unquestionably affected the outcome of the case, and had the effect of depriving plaintiffs of a fair trial.

b. The court's core substantive legal error was its creation of new common law defenses based on defendant's purported subjective belief that it was to his personal

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21. The testimony also significantly undercuts the credibility of Armstrong as a witness.

22. This testimony is described infra at 24, n. 27.

advantage to appropriate plaintiffs' private and confidential documents. These defenses find no precedent in the courts of California, the other forty-nine states, or the federal judiciary. The perverse practical implications of permitting fiduciaries to purloin and disseminate private papers on their unilateral belief that it will protect their personal interests is patent.

Although plaintiffs presently seek only nominal damages, their appeal is fully cognizable. When an action is pursued to vindicate legally protectable rights and interests, as in this case, nominal damages are an appropriate remedy.

POINT I

THE TRIAL COURT'S MASSIVE EVIDENTIARY ERRORS RESULTED IN A MISCARRIAGE OF JUSTICE

The trial court improperly admitted and considered evidence--massive in scope--that fits into two broad categories: (1) hearsay documents and hearsay testimony admitted, over plaintiffs' objections, solely as evidence of defendant's state of mind, but improperly considered by the trial court for their truth; (2) highly inflammatory testimony about plaintiffs that was patently irrelevant to defendant's defenses because wholly disconnected from defendant's state of mind or conduct.

This improper and highly prejudicial evidence pervaded the entirety of the defense case, which was devoted exclusively to an attempt to establish the novel justification defenses discussed in Point II.[23] Because, as the trial court found, plaintiffs established prima facie cases on all four of their claims, this massive improper evidence went to the dispositive issues in the case--the affirmative defenses--and therefore indisputably affected the outcome. This Court should therefore reverse the judgment herein.

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23. This evidence was also used to support defendant's unclean hands defense. The trial court's ruling on plaintiffs' purported unclean hands is not challenged in the present appeal.

Section A of this Point describes the improper evidence; Section B shows that that evidence affected the outcome of the case.

A. The Court Improperly Considered Vast Amounts of Hearsay Evidence and Irrelevant Evidence.

The core of defendant's case was his own testimony about his state of mind--that is, his purported belief that taking the documents would help him defend against future lawsuits or other unspecified retaliation. The bulk of his testimony consisted of the alleged impact that hearsay statements--contained in numerous documents that defendant had seen and in second-hand assertions that he had heard--had had on his subjective belief. The trial court explicitly admitted this massive body of hearsay evidence for the limited purpose of showing defendant's state of mind. Yet, as shown repeatedly in the trial court's Statement of Decision, the court in fact gave full consideration to that highly prejudicial evidence for its truth.

At the inception of defendant's testimony about the documents he had taken, the trial court explicitly ruled that the sole purpose of admitting such hearsay evidence was to show defendant's state of mind. Thus, the court stated:

> Now, it seems to me if that is the thrust of this evidence, the thrust is then why did he take certain documents? How did it relate to his belief that this would be necessary to defend himself in this lawsuit with the Scientology people as distinguished from whether something is true or not true in the abstract, if you follow what I'm saying. (Emphasis supplied.) (R.T. 1799)

Later, the court reemphasized the limited admissibility of the evidence.

> But what we are dealing with is what his explanation is for taking certain documents and submitting them to you.
> ... we are not here to in the abstract prove the truth or falsity of certain

things. (Emphasis supplied). (R.T. 1805)[24]

a. On this basis, defendant testified to his belief that the documents showed that numerous misrepresentations had been made about Mr. Hubbard's activities and accomplishments. In all, defendant testified as to how the contents of approximately 170 separate exhibits and over 300 discrete documents affected his state of mind. The list of such testimony provided in the margin is only by way of example.[25]

b. In addition to admitting this hearsay documentary evidence, the trial court also admitted vast amounts of hearsay testimony during the three full days defendant testified about the history of his relationship with Scientology. Over

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24. Plaintiffs first raised the hearsay objection in their Motion in Limine. (App. 233) During defendant's testimony, plaintiffs repeatedly renewed their objections to the hearsay evidence. (E.g., R.T. 1845, 1964, 1980, 1983, 2046, 2061, 2062) When, at the end of trial, the documents were moved into evidence, objections were again made to each document (R.T. 4571) Of course, it was not necessary to object each time a document was offered in evidence. Where exception is taken to a certain line of evidence, a party is not required to renew the objection as to each document or answer. People v. Brooks, 88 Cal.App.3d 180, 186, 151 Cal.Rptr. 606 (1979); People v. Antick, 15 Cal.3d 79, 95, 123 Cal.Rptr. 475 (1975).

25. Defendant testified to his belief that the documents showed "lies and misrepresentations" about Mr. Hubbard's naval career (R.T. 1837); that other naval documents indicated that Mr. Hubbard, contrary to representations about him made by the Church, had not been crippled and blinded at the end of World War II (R.T. 1841); that Mr. Hubbard had "faked" a hip injury at the beginning of World War II (R.T. 1857); that Mr. Hubbard did not receive as many war medals as had been represented by the Church (R.T. 1865); that, again contrary to representations, Mr. Hubbard was not a war hero (R.T. 1876); that Mr. Hubbard suffered from "mental illness" (R.T. 1906); that Mr. Hubbard had "lied from his earliest youth all the way through and he was lying to me currently" (R.T. 1929); that Mr. Hubbard had lied about his involvement with "black magic" in the early 1950's (R.T. 1953); that Mr. Hubbard was not "mentally balanced" (R.T. 1980); that Mr. Hubbard controlled "everyone connected to him" (R.T. 1983); that although Mr. Hubbard had resigned from all formal positions within the Church of Scientology, he still controlled the organization (R.T. 1994); that Mr. Hubbard controlled Church finances (R.T. 2002); that letters from Mr. Hubbard to the FBI and the Defense Department in the mid 1950's "evidenced Mr. Hubbard's continuing paranoia" (R.T. 2032).

plaintiffs' repeated objections to the hearsay evidence, the trial court, for the limited purpose of showing defendant's state of mind, admitted defendant's testimony about numerous inflammatory matters.[26/]

c. The third category of prejudicial evidence improperly considered by the trial court is a vast array of indisputably irrelevant testimony by defense witnesses. The bulk of the testimony by every defense witness consisted of a potpourri of rumors, beliefs, and, occasionally, personal observation about assorted generalized bad conduct by plaintiffs.[27/]

This testimony was admitted on the theory that it

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26. Among such hearsay evidence was defendant's testimony that 26. Mr. Hubbard directed that defendant be "locked up" (R.T. 1458-59); that the Church purportedly tried to prevent service of court papers on Mr. Hubbard (R.T. 1458, 1535-38); that the Church had directed supposed "intelligence" activities against Mr. Hubbard's son (R.T. 1665); that the Church had an assassination plot against a woman (this evidence was double hearsay) (R.T. 1679); that the Church had funneled money to Mr. Hubbard (R.T. 1780); that the Church conducted supposed "covert intelligence activities" (R.T. 2063); that the Church had placed LSD in people's toothpaste (R.T. 2074).

27. Examples, by no means exhaustive, of the irrelevant and hearsay testimony of defense witnesses are: (1) Laurel Sullivan testified as to contact with Church representatives and counsel for Mary Sue Hubbard in 1983, more than a year after the documents were sent by Mr. Armstrong to Michael Flynn, as examples of harassment by the Church (R.T. 3318-3340). (2) Ms. Sullivan also testified that money had been given to Mr. Hubbard, rather than to the Church, by foreign Scientologists. (R.T. 3011-14) (3) Nancy Dincalci testified about culling of Church members' files (other than defendant's) when she left the Church in 1979. (R.T. 3531-32) (4) Edward Walters, a former Scientology staff member in Las Vegas, testified during the defense cases and again during surrebuttal about activities of the Nevada Church. He did not know Mr. Armstrong and had no contact with him during the time period at issue here. Nor did Mr. Armstrong have any knowledge of Mr. Walter's activities. (R.T. 3579-90) (5) Kima Douglas testified about sums of money allegedly taken out of the country by the Church without reporting it. (R.T. 4458) (6) Howard Schomer, another former Scientologist, testified about alleged abusive activities that occurred after the summer of 1982, as well as contact by the Church during the trial, in 1984. (R.T. 4498ff.)

provided circumstantial evidence of defendant's state of mind.[28/] It was, however, indisputably irrelevant because, as plaintiff repeatedly urged at trial, there was no showing --nor even any allegation--that defendant had any knowledge of these "facts" at the time he took the documents. It is axiomatic that, for purposes of a justification defense, a defendant's "reasonable belief" in the necessity of his conduct is measured only by the facts within his knowledge at the time of his conduct. E.g. Boyer v. Waples 206 Cal.App.2d 725, 727, 24 Cal.Rptr. 192, (1962) (justification rests on what would appear to be necessary to a reasonable person knowing what defendant knew that is, on facts presented to defendant at time he acted); Villines v. Tomerlin, 206 Cal.App.2d 448, 23 Cal.Rptr. 617 (1962) (evidence of plaintiff's prior acts of violence or threats admissible only if defendant establishes his knowledge of those facts at time he acted); People v. Chand, 116 Cal.App.2d 242, 253 P.2d 499 (1953) (same); People v. McDaniels, 70 Cal.App.2d 207, 160 P.2d 854 (1945) (same).

It must be noted that in response to the massive amounts of evidence improperly admitted by the Court within the three categories described above, the plaintiffs attempted to counter the obviously prejudicial impact by introducing rebuttal evidence to show that defendant's evidence was either grossly distorted or false. (R.T. 3775-4364) In stark contrast to the defendant's case, however, the trial court repeatedly interrupted and even mocked the plaintiffs' witnesses (R.T. 2847, 3449, 3456, 3617, 3618, 3833, 3866, 4458, 4486, 4676).

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28. The initial objection to this testimony was made in the form of motions in limine that testimony relating to alleged bad acts of the Church and Mr. Hubbard, his supposed control over the Church, and the history of the relationship between Mr. Hubbard and the Church be excluded on relevancy grounds. (App. 231) Subsequently, objections were made within the confines of the court's ruling denying those motions.

Of course, irrelevant evidence will not support a judgment. If the evidence has no tendency to prove a material issue, it must be disregarded by the court of appeal, even in the absence of an objection. Tahoe National Bank v. Phillips 4 Cal.3d 11, 23, 92 Cal.Rptr. 704 (1971).

B. The Massive Bodies of Hearsay and Irrelevant Evidence Unquestionably Affected the Outcome of the Case

This court must reverse if the trial court's evidentiary errors resulted in a "miscarriage of justice." Calif. Constitution Article VI, Section 13. Whether the initial trial was before a judge or a jury, there is a "miscarriage of justice" if it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243 (1956), cert denied 355 U.S. 846, 78 S.Ct. 70 (1957); Pool v. City of Oakland, 42 Cal.3d 1051, 232 Cal.Rptr. 528, 538-39 (1986); Estate of Kime 144 Cal.App.3d 246, 260, 193 Cal.Rptr. 718 (1983); 9 Witkin, Cal. Procedure (3d Ed. 1985) Appeal § 324, at 334-35). Under the "reasonably probable" standard, the possibility of a different result may be "far from certain" but still require reversal. Estate of Kime, supra, 144 Cal.App. 3d at 260.29/

In the often-quoted language of Estate of James v. Jones 124 Cal. 653, 655, 57 P. 577 (1889):

> If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows it may have been that

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29. In Pool v. City of Oakland, 42 Cal.3d 1051, 232 Cal.Rptr. 528, 539 (1986), the Court identified several factors which recent courts have considered "in determining whether an error prejudicially affected the verdict." However, only one of these "the degree of conflict in the evidence on critical issues," is at all relevant to the present case. The others pertain specifically to a trial court's errors in instructing a jury, something clearly not at issue here. Regarding the relevant factor there can be no doubt that on the critical issue of whether defendant was justified in his tortious conduct, not only was there a significant degree of conflict, but the evidence weighed overwhelmingly in favor of plaintiffs, as argued supra in Part II. Indeed, if not for the trial court's massive evidentiary errors, there is little question but that defendant's justification defenses to plaintiffs' prima facie tort claims would have had to fail.

> particular evidence which turned the scale and lost the case to the appellants. This must of necessity be the rule wherever improper evidence has been admitted which upon its face tends in any degree to affect the final conclusion of the court.

Numerous recent courts of appeal decisions have ordered new trials on the grounds that improperly admitted evidence may have "tipped the scales" against appellants. Estate of Kime, supra, 144 Cal.App.3d 246, 260 (erroneous admission of attorney-client confidences); Wilson v. Manduca, 233 Cal.App. 2d 184, 189, 43 Cal.Rptr. 435 (1965); Weinsenberg v. Thomas, 9 Cal.App.3d 961, 965, 89 Cal.Rptr 113 (1970) (improper admission of extrinsic evidence to interpret contract).

Further, where the record discloses multiple errors whose cumulative effect may be prejudicial, reversal is required, even if each particular error is relatively minor. See, 9 Witkin, California Procedure (3d Ed. 1985) § 359, at 362, and cases cited therein.

In this case, there is absolutely no question that the trial court's decision was affected by the improperly considered evidence. This is shown by (1) the trial court's litany of generalized pejorative findings about plaintiffs, findings that could only be based on the inflammatory and derogatory evidence discussed above, and (2) the trial court's specific findings that relied explicitly on improper evidence.

In its Statement of Decision, the trial court asserted that the Church:

> has harassed and abused those persons not in the Church whom it perceives as enemies. The organization clearly is schizophrenic and paranoid, and this bizarre combination seems to be a reflection of its founder LRH. The evidence portrays a man who has been virtually a pathological liar when it comes to his history, background and achievements. The writings and documents in evidence additionally reflect his egoism, greed, avarice, lust for power, and vindictiveness and aggressiveness against persons perceived by him to be disloyal or hostile. At the same time it appears that he is charismatic and highly capable of

> motivating, organizing, controlling, manipulating, and inspiring his adherents. ... Obviously, he is and has been a very complex person, and that complexity is further reflected in his alter ego, the Church of Scientology. Notwithstanding protestations to the contrary, this court is satisfied that LRH runs the Church in all ways through the Sea Organization, his role of Commodore, and the Commodore's Messengers. (App. 258-59)

Each of these findings is based improperly upon the hearsay statements in the sealed documents and in defendant's testimony and upon the irrelevant testimony of the other defense witnesses. It is inconceivable that the trial judge's consideration of that huge body of inflammatory evidence for its truth did not influence his rulings as to defendant's subjective state of mind.

Indeed, the trial court, in upholding defendant's subjective justification defense, rested explicitly on the testimony of defense witnesses--testimony which, as discussed above, was patently irrelevant to that state of mind defense. The trial court found "the testimony of Gerald and Jocelyn Armstrong, Laurel Sullivan, Nancy Dincalci, Edward Walters, Omar Garrison, Kima Douglas and Howard Schomer [all defense witnesses] to be credible, extremely persuasive, and the defense of privilege or justification established and corroborated by this evidence." (App. 257)

The trial court's improper consideration of hearsay evidence for its truth is shown in its treatment of Exhibit AAA--referred to by the court as "GO121669"--which defendant, after leaving the Church, had obtained from his attorney. Over plaintiffs' objection, the trial court admitted the hearsay document only as confirmation of defendant's state of mind testimony. (R.T. 2046-47) However, in its discussion of the facts adduced by defendant in support of his justification defense, the trial court twice referred to the contents of that document. (App. 260, 261) The trial court also explicitly

relied on the sweeping hearsay statements contained in a report by an agency of the French government. (App. 258)[30/]

But by far the most egregious of the trial court's "findings" was its conclusion--again based upon evidence admitted solely to show Armstrong's state of mind--that the founder of the Scientology religion was a paranoid schizophrenic, and that the entire church, including presumably its members and clergy, also is paranoid schizophrenic. It would be entirely improper and evidence of passion and prejudice for a trial judge to enter such "findings" based upon testimony admitted for its truth. The fact that the trial judge was so carried away that he made such findings based upon evidence that he himself had admitted for only a limited purpose clearly demonstrates that the effect of admitting massive amounts of such marginally relevant and irrelevant evidence was to deprive the plaintiffs of a fair trial.

In conclusion, the trial court considered massive bodies of irrelevant and hearsay evidence. And, in ruling on the dispositive issues in the case, the trial court relied, both explicitly and implicitly, on that evidence.[31/] There is thus much more than a "reasonable probability" that the outcome was affected--there is a certainty. Reversal is required.

POINT II

THE TRIAL COURT'S JUDGMENT RESTED ON DEFENSES THAT, AS A MATTER OF LAW, ARE INAPPLICABLE TO ANY OF THE FOUR CAUSES OF ACTION AS TO WHICH PLAINTIFFS

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30. Not only are the contents of that report hearsay, but the trial court explicitly ruled that it would draw no inferences from the report but was admitting the report only to show that it was among the Church archives. (R.T. 4655)

31. It is precisely the trial court's "findings" based upon evidence not admitted for its truth which other parties in other litigation continually have sought to invoke against the Church, either to support their own allegations or as collateral estoppel. Thus, the trial court's improper findings continue to have a pernicious effect on the plaintiffs' rights and reputation. In no small measure, this appeal has been brought to assure that the judgment and decision below does not have such a continuing pernicious impact on plaintiffs' rights.

ESTABLISHED UNREBUTTED PRIMA FACIE CASES

INTRODUCTION

The trial court ruled that at trial plaintiffs established prima facie cases of invasion of privacy, breach of fiduciary duty, breach of confidence, and conversion. The court's grant of judgment to defendant rested solely on the court's creation of new common law defenses--defenses for which there is no precedent in the case law of the courts of California nor, indeed, in any decision rendered by the courts of the other forty-nine states or the federal judiciary.

The discussion in this Point details the specific doctrinal errors that, in themselves, fatally infect the trial court's novel defenses. Those specific errors, however, reflect deeper anomalies and confusions in the trial court's procedure, in its substantive legal analysis, and in the practical implications of its decision. This Introduction sets forth these three deeper errors.

a. On the eve of trial, the trial court ruled, for the first time, that defendant could raise a sweeping justification defense to plaintiffs' claims. The trial court stated the defenses as follows:

> "So, it seems to me, that we have to be concerned, I suppose, with the reasons which the defendant had asserted [as] to why he turned these documents over to third persons or a third party, and it seems to me that [if] he had a reasonable good faith belief that this is evidence of a crime or criminal conduct, that [sic] he would be justified in turning it over to a third person." (R.T. 129-130)

Consistent with this statement of a subjective standard of justification, the bulk of evidence adduced by defendant at trial was admitted by the trial court solely to show defendant's state of mind.[32/] After trial, the trial

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32. The trial court repeatedly and explicitly ruled that defendant's justification defense rested only on defendant's subjective belief that the documents would be useful in defense of unspecified litigation or harassment. On a number of

court's decision rested on defendant's purported subjective justification. That subjective justification, however, was no longer defendant's belief that he was exposing crime but rather that he was threatened with lawsuits and other unspecified retaliation. Thus, the trial court created an ill-defined, sweeping, subjective defense on the eve of trial and, during and after trial, fundamentally altered the substance of that defense.

b. Apart from the procedural confusion in the court's last minute creation and after-trial reshaping of the justification defense, that novel defense--in each of the trial court's shifting versions of it--appears to rest on a fundamental misunderstanding about the proper application of defenses to distinct causes of action.

The trial court's legal analysis, in its entirety, consisted of a recital of two sections of the Restatement (Second) of Agency, two sections of the Restatement (Second) of Torts, and one forty year-old California Court of Appeal decision. The court, however, did not state which of its findings of fact were meant to support which of the defenses contained in those legal authorities. Nor did the court state which of those defenses applied to which of the four prima facie claims established by plaintiffs.

To the extent that the court, drawing on those disparate legal authorities, intended to fashion a single "justification" defense applicable to all four causes of action, its analysis is erroneous. Each of those legal authorities, by

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occasions, the trial court ruled that the actual truth or falsity of plaintiffs' alleged misrepresentations and abuses was not on trial. (E.g. R.T. 1799, 1805, 4602)

That the trial court erroneously considered this evidence for purposes other than for showing defendant's state of mind, and that this evidentiary error constitutes a miscarriage of justice requiring a new trial, are discussed in Point I of this Brief.

its own terms, is applicable only to a single cause of action.[33/] That is, even if an authority cited gives defendant a valid defense to one of the four claims, this does not defeat the other three claims. It is defendant's burden to establish a distinct defense for each of the four causes of action.

The discussion below therefore attempts to give the most legally coherent reading to the trial court's decision by identifying the findings of fact and legal authorities that conceivably pertain to each of the four causes of action. As that discussion shows, the court's justification defenses find no support in the legal authorities that are pertinent to any of those causes of action.

c. The practical result of the trial court's new defenses is perverse in four ways: First, plaintiffs were divested of extremely private and highly valuable documents which they indisputably owned and/or were rightfully entitled to possess. Second, the new defenses granted to a fiduciary--indeed, a fiduciary occupying the most sensitive, confidential relationship to appellants--the power to assert control over such documents and information solely on the basis of his subjective belief that it would serve his personal advantage. Third, the new defenses permitted a fiduciary to exercise that power unilaterally and without prior judicial review, even though there is no dispute that the fiduciary had time to resort to judicial process before infringing on plaintiffs'

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33. Thus, Sections 395 and 418 of the Restatement (Second) of agency, and Willig v. Gold, 75 Cal.App.2d 809, 814, 171 P.2d 754 (1946), by their own terms, state defenses only to a claim of an agent's breach of fiduciary duty. Likewise, Section 261 of the Restatement (Second) of Torts explicitly applies only to a claim of trespass or conversion; and Section 652A of the Restatement (Second) of Torts explicitly applies only to an invasion of privacy claim. (The court cited no legal authority supporting a defense to plaintiffs' breach of confidence claim.) It is no surprise that these legal authorities state defenses applicable to individual causes of actions, rather than defenses generally applicable to all tort claims. Each cause of action rests on particular interests and policies; the corresponding defenses therefore signify specific exceptions to judicial protection of those particular interests and policies, as shown by the Restatement comments and case law discussed in detail below.

fundamental--indeed, constitutionally protected--personal and property rights. And, fourth, the new defenses permitted a fiduciary unilaterally to seize the private material on his belief that it is, rather than the instrumentality or fruits of actual crime, merely indirect evidence of alleged wrongdoings that might be helpful to defendant in his defense of unspecified future litigation.

In short, the trial court permitted one who occupies a highly sensitive fiduciary position to seize extremely personal, private documents and information, under circumstances in which even an authorized law enforcement officer would not be permitted to seize even non-confidential instrumentalities of crime--that is, under circumstances in which there was indisputably no necessity for action without resort to prior judicial authorization.

The practical impact of such a new common law rule on individuals and on the operation of institutions, both commercial and non-commercial, is hard to overestimate. The facts of this case, of course, illustrate the point. The church appointed defendant, a long-time devotee, to one of the most sensitive fiduciary positions within the Church--that is, custodian of the most private, personal archives of the Church's founder. After becoming disillusioned with, and taking an adversarial stance against the Church, defendant appropriated a large part of those archives on his ostensible belief that they might serve as evidence in unspecified future litigation or as some kind of shield against unspecified future wrongdoing by the Church. To permit such conduct is to place the fundamental privacy and property rights of all employers at the mercy of the subjective discretion and passion of disgruntled employees.

A. The Trial Court's Creation of a Justification Defense Against Plaintiffs' Invasion of Privacy Claim Stems From a Flatly Erroneous Interpretation of the Prima Facie Elements of Such a Claim

1. The Prima Facie Elements of An "Intrusion Upon Seclusion" Claim Were Established

The trial court found that a prima facie case of invasion of privacy was established. Indeed, the facts found by the court indisputably established such a claim both under the

traditional common law standards adopted by the California courts and under the broader protections of privacy enshrined since 1972 in the California Constitution.

In the leading case applying the California common law of "intrusion" upon privacy, defendant's agents, without plaintiff's consent, made photographs and recordings of plaintiff in his den, engaged in the allegedly fraudulent practice of medicine. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). The court concluded that California's law of invasion of privacy includes "instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded," and that defendant's conduct constituted such an intrusion. Id. at 249. (Quoting Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir. 1969), cert. denied, 395 U.S. 947 (1969)). See also Miller v. National Broadcasting Co., 187 Cal.App.3d 1463, 232 Cal.Rptr. 668, 679 (1986); Nicholson v. McClatchy Newspapers, 177 Cal.App. 3d 509, 223 Cal.Rptr. 58, 63 (1986) (citing Dietemann approvingly). The Restatement (Second) of Torts § 652B similarly defines the tort of "Intrusion upon seclusion" as follows:

> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

There is no question that the facts of this case, as found by the trial court, establish the elements of the tort of intrusion: The documents in question were conceded by defendant to be private and personal; and defendant's unauthorized assumption of control over such deeply private documents would unquestionably violate the expectations--and offend the sensibilities--of the ordinary, reasonable man. That the documents at issue--personal letters, diaries, self-analyses, journals, family memorabilia, financial documents, documents tracing the personal growth of a religion's founder over the course of years--are private materials hardly requires discussion. Indeed, defendant has repeatedly admitted as much.

Numerous courts have affirmed the peculiarly private nature of personal papers. In the early case of Boyd v. United States, 116 U.S. 616, 627-28, 6 S.Ct. 524, 531 (1886), the Supreme Court quoted Lord Camden's statement that:

> "[P]apers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect."

More recently, in Fisher v. United States, 425 U.S. 391, 427, 96 S.Ct. 1569 (1976), Justice Brennan's concurring opinion affirmed that personal papers "constitute an integral aspect of a person's private enclave." And in Nixon v. Administrator of General Services, 433 U.S. 425, 459, 465, 97 S.Ct. 2777, 2798, 2801 (1977), the Court found that former President Nixon's "'private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files'" were subject to "'a legitimate expectation of privacy,'" quoting Nixon v. Administrator, 405 F.Supp. 321, 359 (1976). Id. 433 U.S. 459.

California courts have also recognized that personal papers and personal information lie at the heart of the privacy protected at common law. In City of Carmel-by-the-Sea v. Young, 2 Cal.3d 259, 268, 85 Cal.Rptr. 1 (1970), the court ruled that one's personal documents--as well as those of one's spouse and children--are within the legitimate zone of common law privacy. Indeed, in United States v. Hubbard, 650 F.2d 293, 305-307 (D.C. Cir. 1980), the court, applying California law, found that the Church of Scientology could assert a state privacy interest--on behalf of itself and its members--as to a large body of internal church documents seized by the government.[34/]

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34. The Hubbard case thus clearly establishes the Church's standing to assert a claim of privacy--on behalf of itself and its members--as to Church archives. Because the Church

There can thus be no question that under California law the documents in question fall within the zone of privacy "'from which an ordinary man in plaintiffs' position could reasonably expect that the particular defendant should be excluded.'" Dietemann, 449 F.2d at 249, quoting Pearson v. Dodd, 410 F.2d 704, see also Miller v. National Broadcasting Co., 187 Cal.App. 3d 1463, 1484, 232 Cal.Rptr. 668, 679 (1986). Equally, under the Restatement standard it is unquestionable that the unauthorized assumption of control over personal documents "would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B. Indeed, Comment b to Section 652B states explicitly that an "intrusion upon seclusion" claim arises from unauthorized interference with "private and personal mail" and with other "personal documents."

Defendant intrusively acquired the private documents by removing them from the Church in December 1981, and by retrieving them from Omar Garrison's storage in the spring/summer of 1982, with the intent of using them for his own purposes. Thus, the trial court explicitly found that defendant took the documents from Mr. Garrison in order to deliver them to Mr. Flynn and others. (App. 254) While the trial court found that Mr. Garrison purported to give permission to defendant to take the documents (id.), there is no dispute that both Mr. Garrison and defendant were aware that they were authorized to use the documents only for purposes of preparing the biography

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possessed the archives as bailee of L. Ron Hubbard and Mary Sue Hubbard, the Church is also entitled to--indeed, the Church has a duty to--assert the Hubbards' privacy interest as well. "The custodian (of private information) has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of (it) is entitled to expect that his right will be thus asserted." Board of Trustees v. Superior Court, 119 Cal.App. 3d 516, 525-26, 174 Cal.Rptr. 160 (1981), cert. denied, Dong v. Board of Trustees, 484 U.S. 1019 (1988) (quoting Craig v. Municipal Court, 100 Cal.App. 3d 69, 77, 161 Cal.Rptr. 19 (1979) (court's parentheticals); see also Socialist Workers Party v. Attorney General, 463 F. Supp. 515, 525 (S.D.N.Y. 1978) (unincorporated association has standing to bring intrusion claim); Socialist Workers Party v. Attorney General of U.S., 642 F.Supp. 1357, 1421-22 (S.D.N.Y. 1986) (association may bring right of privacy or intrusion claim).

of Mr. Hubbard. See Statement of Facts, supra. Indeed, the trial court found that defendant's use of the documents was for purposes other than the "certain specific purposes" that had been authorized. (App. 254) Thus, notwithstanding Mr. Garrison's purported grant of "permission,"[35/] defendant's acquisition of the documents for unauthorized purposes was a wrongful intrusion.

But even if defendant's physical acquisition of the documents had been authorized, his later retention of control over them, including his assertion of the power to grant others access to them, fits securely within the definition of intrusion. The Restatement (Second) of Torts states that an intrusion claim consists of "an intentional interference with [plaintiff's] interest in solitude or seclusion, either as to his person or as to his private affairs or concerns," and that such intentional interference may occur "physically or otherwise." Section 652B, and Comment a (emphasis added). Numerous courts have adopted the rule that both physical and non-physical interferences with a person's control over others' access to his private information may constitute tortious intrusions. E.g., Dietemann v. Time, 449 F.2d at 249; Pearson v. Dodd, 410 F.2d at 704; Rogers v. Loews, 526 F.Supp. 523, 528 (D.D.C. 1981); Sofka v. Thal, 662 S.W.2d 502, 510 (Mo. 1983); Oliver v. Pacific Northwest Bell, 632 P.2d 1295, 1298 (Or.App. 1981); Lamberto v. Bown, 326 N.W.2d 305, 309 (Iowa 1982); Froelich v. Adair, 516 P.2d 993, 995 (Kan. 1973).

In Phillips v. Smalley Maintenance Services, 435 So.2d 705, 709 (Ala. 1983), the court ruled that wrongful acquisition of information is not a necessary element of a claim for intrusion. The court stated that interference with one's "personality" or "psychological integrity" may be as intrusive as interference with a "physically defined area or place," and that "[o]ne's emotional sanctum is certainly due the same

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35. Mr. Garrison testified that he did not intend to give permission for the wholesale taking of documents undertaken by Armstrong, or for the purposes to which Armstrong put them to use (R.T. 1347-50).

expectations of privacy as one's physical environment." Id. at 710, 711. See also Grimsley v. Guccione, 703 F.Supp. 903, 909 (M.D. Ala. 1988). Defendant's arrogation of control over, and his assertion of the right to grant others access to private documents, clearly constitute incursions on the "psychological integrity" and "emotional sanct[ity]" of plaintiffs' private concerns. Hence, in Pearson v. Dodd, 410 F.2d at 704-5, the court assumed that plaintiff's employees, whose physical access to certain confidential files was authorized, nonetheless committed an intrusion when they asserted control of the files "with the intent to show them to unauthorized outsiders." This precisely characterizes defendant's wrongdoing.

Indeed, in the Dietemann case itself, the court conceded that defendants' physical presence in plaintiff's den was authorized and, therefore, that defendants had a right to see and hear, and to tell others what they saw and heard. 449 F.2d at 249. Defendants' intrusion, rather, consisted of their making photographs and recordings with the intent of later publication. Analogously, in this case, even if defendant lawfully had physical access to the documents, his assertion of control over them, including his photocopying of them, with the intent to give them to third parties, constitutes common law intrusion.

Thus, the trial court's ruling that a prima facie invasion of privacy claim was established is fully supported by settled common law doctrine. It is supported a fortiori by the 1972 Amendment to the California Constitution, which was "intended to be an expansion of the [common law] privacy right." Porten v. University of San Francisco, 64 Cal.App. 3d 825, 829, 134 Cal.Rptr. 839 (1976). See also Cutter v. Brownbridge, 183 Cal. App. 3d 836, 228 Cal.Rptr. 545, 549 (1986). That Amendment added the right of "privacy" to the "inalienable rights" enshrined in Article 1, § 1 of the Constitution. Indeed, the Amendment provides broader protection to privacy than does the federal constitution, which, as indicated by the Supreme Court authority cited above, itself places personal documents securely within the protected zone of privacy. City of Santa Barbara v. Adamson, 27 Cal.3d 123, 130 n.3, 164 Cal.Rptr. 539 (1980).

Thus, numerous cases have found personal documents protected by the Constitutional right of privacy. E.g., City of Carmel, id. (Personal and family documents): Burrows v. Superior Court, 13 Cal.3d 238, 118 Cal.Rptr. 166 (1974) (credit documents); Porten v. University of San Francisco, supra (educational files); Board of Trustees v. Superior Court, supra (personnel files). Cutter v. Brownbridge, supra (medical records); Binder v. Superior Court (Neufeld), 196 C.A. 3d 893, 242 Cal. Rptr. 231 (1987) (medical photographs); Nakao v. Rushen, 635 F.Supp. 1362, 1366 (N.D. Ca. 1986) (personal letters).

Indeed, one of the specific "mischiefs" against which the Amendment was directed was "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party." White v. Davis, 13 Cal. 3d 757, 775, 120 Cal.Rptr. 94 (1975). The trial court explicitly found that defendant had so abused the information given him by the Church. (App. 254)

Therefore, under settled common law doctrine and, a fortiori, under broader California Constitutional protection, plaintiff and intervenor established a prima facie case of invasion of privacy.

2. The Trial Court's Novel Justification Defense Rests on an Erroneous Interpretation of the Restatement of Torts, and Subverts the Fundamental Policies Underpinning the Right of Privacy.

The trial court, in fashioning its novel justification defense, cited a single legal authority that pertains to a claim of invasion of privacy: Section 652A of the Restatement (Second) of Torts. The court's reading of § 652A is simply erroneous. That Section states, in pertinent part, that "[t]he right of privacy is invaded by ... unreasonable intrusion upon the seclusion of another, as stated in § 652B." The trial court interpreted the word "unreasonable" to require the application of a "balancing test, weighing the nature and extent of the invasion, as against the purported justification therefore." (App. 256) Applying this test, the court ruled that defendant's intrusion was justified by his belief that the documents would

be useful in his defense of an anticipated lawsuit and in discouraging physical harassment. The trial court conceded that defendant "took voluminous materials, some of which appear only marginally relevant to his defense," but the court excused defendant because "he was not a lawyer." (App. 261)[36/]

The court, however, cited no case law nor any of the extensive Restatement Sections and Comments explaining the meaning of the "reasonableness" requirement. In fact, the case law--in California and in every other jurisdiction recognizing the tort of intrusion--and the Restatement itself flatly contradict the trial court's new defense. As detailed below, these authorities state in the most explicit terms that: (1) The "reasonableness" standard refers only to whether the intrusion on privacy would be offensive to the ordinary ("reasonable") person; that is, the test looks to the reasonable sensibilities of the victim and has nothing to do with the motives or interests of the intruder. (2) The courts have universally rejected defendant's argument that his unauthorized acquisition of private documents is justified by his particular motive of obtaining them for use in defending either himself or an anticipated lawsuit. (3) Tortious intrusion is never justified by the private or public interests that motivate the intruder--not even if the intruder seeks to serve the highest constitutional values. To find controlling precedent as to each of these three propositions, the court need look no further than the leading case under California law, Dietemann v. Time, Inc., supra, which is discussed at length below.

Indeed, because the bulk of intrusion cases arise in the context of invasions of privacy aimed at securing evidence or contraband or at otherwise serving the private advantage of

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36. Defendant repeatedly claimed, however, to be an expert on the content and meaning of the documents. Such an expert surely would have been able to limit his seizure of private documents to those "relevant to his defense." The fact that Armstrong took many more documents than "necessary" demonstrates the after-the-fact nature of the justification asserted. The truth is, as Armstrong himself admitted (R.T. 4579, 764-65, 771-72), he took the documents to assist Flynn in his litigation campaign against the Church.

the defendant, it is no surprise that the courts have universally rejected a justification defense that would free potential litigants--based solely on their subjective belief--to acquire private documents by hook or by crook. It would be utterly anomalous if the protections against infringement of such a fundamental constitutional right were made contingent on the infringing party's subjective belief as to whether or not committing a violation of the right will serve his personal interests. Such a rule would explode the core interest that the right of privacy is intended to safeguard.

The trial court's novel defense would also shatter the delicately crafted judicial mechanism for accommodating the discovery goals of private litigants and the public interest in preserving the privacy of personal documents. In Valley Bank of Nevada v. Superior Court 15 Cal.3d 652, 125 Cal.Rptr. 553 (1975), the court held that when a litigant seeks discovery of confidential information, all interested persons, including third parties, must be afforded a fair opportunity to assert their privacy interests in the information. In such cases, courts must carefully weigh several enumerated factors in determining whether discovery should be denied or whether protective orders should issue. Id. See also Scull v. Superior Court (People), 206 Cal.App. 3d 784, 790-91, 254 Cal.Rptr. 24, 27 (1988). This prophylactic scheme of prior judicial review--with all the attendant safeguards of notice, opportunity to be heard, and adjudication constrained by judicially defined standards--would be wholly subverted by the trial court's novel defenses.

The legal limits on government searches and seizures provide a powerful analogy. Law enforcement authorities, of course, may not intrude into legitimate areas of privacy without prior judicial authorization (in the form of a search warrant), even when they have objectively-based probable cause to believe that they will find evidence of crime or fraud. It is inconceivable that in California, where constitutional privacy rights apply equally against both private parties and the state, e.g., Porten v. University of San Francisco, 64 Cal.App.3d 825, 829, 134 Cal.Rptr. 839 (1976), a private party could be licensed

to intrude on private documents without prior judicial authorization, on the basis of the party's unilateral, subjective belief that the documents may contain mere indirect evidence of unspecified wrongdoing.

The detailed doctrinal analysis below demonstrate that, consonant with these overwhelming policy considerations, the courts have universally rejected the trial court's novel justification defense.

a. The trial court found its justification defense in the "unreasonableness" standard of Restatement § 652A(2)(a). That Section refers us to § 652B for a definition of "unreasonable intrusion." Section 652B states:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

On its face, then, the Restatement does not contemplate that the unreasonableness of an intrusion is to be measured by a balancing of interests. Rather, it is explicitly defines unreasonableness from the point of view of the victim of the intrusion. That is, the test is whether the ordinary victim of an intrusion would be highly offended. The interests or motives of the intruder are, under the Restatement, nowhere to be balanced against the offensiveness to the victim.

This plain facial meaning of § 652B is the interpretation the courts have universally given it--until, that is, the decision of the court below. E.g, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (test is whether reasonable man would expect that defendant should be excluded from the zone of privacy); Miller v. National Broadcasting Co., 187 Cal.App. 3d 1463, 1484 (test is whether "reasonable people could regard the ... intrusion ... as 'highly offensive' conduct, thus meeting the limitation on a privacy cause of action Restatement of Torts, section 652B imposes"); Emerson v. J.F. Shea Co., 76 Cal.App. 3d 579, 592, 143 Cal.Rptr. 170 (1978) ("test is what is objectionable or offensive to the reasonable man"); Noble v.

Sears, Roebuck and Co., 33 Cal.App.3d 654, 659-60, 109 Cal.Rptr. 269 (1971) (same).

b. The Restatement, in two of the illustrations to Comment b to Section 652B itself, explicitly rejects the trial court's novel rule that defendant's intrusion can be justified if the purpose of the intrusion is to obtain evidence for defense of a lawsuit:

> 2. A, a private detective seeking evidence for use in a lawsuit rents a room in a house adjoining B's residence, and for two weeks looks into the windows of B's upstairs bedroom through a telescope taking intimate pictures with a telescopic lens. A has invaded B's privacy.
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> * * *
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> 4. A is seeking evidence for use in a civil action he is bringing against B. He goes to the bank in which B has his personal account, exhibits a forged court order, and demands to be allowed to examine the bank's records of the account. The bank submits to the order and permits him to do so. A has invaded B's privacy.
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> (Emphasis added).

In both these illustrations, then, an intrusion claim is established notwithstanding that the intruder was seeking evidence for use in a lawsuit against the victim.

Numerous courts, addressing fact situations similar to these restatement illustrations, have reached the same result. In the leading case applying California law, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), the court held that defendants had no privilege to commit an intrusion upon plaintiff's privacy notwithstanding that defendants were working in tandem with the District Attorney to obtain evidence of plaintiff's alleged criminal fraud. Likewise, in Noble v. Sears Roebuck and Co., supra, defendants allegedly invaded the premises of plaintiff's hospital room in order to obtain information for use in plaintiff's personal injury action against defendants. This court ruled that the alleged facts, if proven, constituted an intrusion.

Indeed, in the first American common law case on intrusion, the defendant corporation argued that it was privileged to intrude into the privacy of plaintiff's hospital room (by planting a "bug") on the ground that it was seeking evidence to defend itself against an anticipated fraudulent lawsuit by plaintiff. McDaniel v. Atlanta Coca-Cola Bottling Co., 2 S.E. 2d 810, 818 (Ga. App. 1939). The Georgia court held that there was no such "justification" defense, particularly because plaintiff's anticipated lawsuit, even if fraudulent, "could not, in advance of judgment in favor of the defendant, be deemed a violation of any right of the defendant." Id. Applying these precedents from California and Georgia law, the Kansas Supreme Court rejected a defendant's similar attempt to justify his intrusive conduct. In Froelich v. Adair, 516 P.2d 993 (Kan. 1973), the defendant surreptitiously obtained a sample of plaintiff's hair for use in a defamation action. The court held that defendant's allegedly "excusable conduct based upon gathering privileged communications in connection with a judicial proceeding is not a defense to intrusion." Id. at 997.

There are innumerable analogous cases in which defendants, seeking to acquire evidence or contraband, conducted intrusive searches. No court has found such an intrusion justified or excused by the defendants' purpose of seeking evidence or of exposing crime or fraud. E.g., Fowler v. Southern Bell, 343 F.2d 150 (5th Cir. 1965); Young v. Western A.R. Co., 148 S.E. 414, 39 Ga.App.761 (1929); Thompson v. City of Jacksonville, 130 So.2d 105 (Fla. App., 1961), cert. denied, 147 So.2d 530 (1962).

c. The established rule that one is not privileged to intrude into another's privacy in order to acquire evidence for litigation purposes is consonant with the broader principle that "[p]rivilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication." Dietemann, 449 F.2d

at 249-50.[37] This principle rests on the distinction between the intrusion type of invasion of privacy at issue in this case--which occurs when there is any intentional interference with private information--and the three other types of invasion of privacy, which require widespread publication of private information.[38] Because a claim for intrusion does not require publication, "public interest" privileges rooted in First Amendment principles of freedom of expression are inapplicable. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) (First amendment requires qualified privilege for defamatory publication about public figures); Time, Inc., v. Hill, 385 U.S. 374, 87 S.Ct. 534 (1967) (Same First Amendment privilege applicable to publication constituting invasion of privacy). As the court stated in Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969):

> [I]n analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate. Where there is intrusion, the intruder should generally be liable whatever the content of what he learns. An eavesdropper

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37. A defendant's dissemination of private information that he intrusively acquired - as in this case - may enhance the injury caused by the intrusion, but of course does not alter the prima facie elements of, or the defenses applicable to, the underlying intrusion claim. Dietemann, 449 F.2d at 249-50.

38. A majority of states, including California, recognize four categories of common law invasion of privacy. These include:

> 1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.
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> 2. Public disclosure of embarrassing private facts about the plaintiff.
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> 3. Publicity which places the plaintiff in a false light in the public eye.
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> 4. Appropriation for the defendant's advantage, of the plaintiff's name or likeness.

Miller v. National Broadcasting Co., 187 Cal.App. 3d 1463, 1482, 232 Cal.Rptr. 668 (1986) (quoting Prosser, Privacy, 48 Cal.L.Rev. 383, 389 (1960)). See also, Restatement (Second) of Torts, §§ 652B-652E.

> to the marital bedroom may hear marital intimacies, or he may hear statements of fact or opinion of legitimate interest to the public; for purposes of liability that should make no difference. On the other hand, where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained.
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> (emphasis added)

Thus, defendant here cannot win exoneration by appealing to the purported public interest in the content of the documents he took--not, a fortiori, by appealing to his private interest in obtaining the documents for an anticipated litigation defense. Indeed, even if an intruder seeks to serve the highest constitutional values, he is not justified in intruding on another's protected sphere of privacy. In Dietemann, the Ninth Circuit, applying California law, so stated in the clearest terms:

> The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime. 449 F.2d at 249 (emphasis added)

See also Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) ("[c]rimes and torts committed in news gathering are not protected"); Nicholson v. McClatchy Newspapers, 177 Cal.App.3d 509, 519, 223 Cal.Rptr. 63.

Thus, even if defendant in this case reasonably suspected that the purloined documents would expose frauds against the public, he was not privileged to commit a tortious intrusion.39/

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39. Even if there is a justification defense to intrusion claims, the defense is inapplicable in this case under the doctrine of "abuse of privilege." The trial court found that defendant "engaged in overkill" in that "he took voluminous

d. Assuming arguendo that the trial court's "reasonableness" defense were not undercut by universally accepted legal doctrine and principles, the court's determination that defendant's interests outweighed plaintiffs' is, in any event, erroneous under clearly established California law. Even in the context of prior judicial screening of requests to disclose private matters, California's "courts generally have concluded that the public interest in preserving confidential information outweighs in importance the interest of a private litigant ..." City & County of San Francisco v. Superior Court, 38 Cal.2d 156, 163, 238 P.2d 581 (1951). See also Board of Trustees v. Superior Court, 119 Cal.App.3d 516, 530, 174 Cal.Rptr. 160 (1981), cert, denied, Dong v. Bd of Trustees, 484 U.S. 1019 (1988) (citing numerous cases). Thus, defendant's interest as a private litigant in acquiring documents for use in anticipated private lawsuits cannot

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materials, some of which appear only marginally relevant to his defense" of anticipated litigation. Section 605A of the Restatement (Second) of Torts--pertaining to the law of defamation but, under Sections 652F and 652G, incorporated by reference into the law of invasion of privacy--provides:

> One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another that is within the privilege, abuses the privilege if he also publishes unprivileged defamatory matter.

See also Institute of Athletic Motivation v. University of Illinois, 114 Cal.App.3d 1, 12, 170 Cal.Rptr. 411, 417-18 (1980).

By making the privilege applicable only to publications that invade privacy, these sections recognize the above-discussed rule that in intrusion cases--in which publication is not an element--the various privileges applicable to publications that are defamatory or that invade privacy are inapplicable. But even if such privileges were applicable to intrusion claims, the defendant abused the privilege and lost it.

outweigh California's constitutionally recognized public interest in preserving the right to privacy.[40]

B. The Trial Court Relied On A Defense To Breaches of Confidence And Of Fiduciary Duty That Is Inapplicable To A Case, Such As This, In Which The Agent Wrongfully Acquires Confidential Documents In The Absence Of An Emergency.

1. Plaintiff and intervenor Established Prima Facie Cases of Breach of Fiduciary Duty and Breach of Confidence

The trial court found that plaintiff Church made out prima facie cases of breach of fiduciary duty and breach of confidence by defendant. Because of the similarity between the elements of these two claims, this section discusses them together.[41]

The source of defendant's fiduciary duty toward plaintiff lies in the court's finding that defendant "had an informal employee-employer relationship with the Church." Under California law, it is well established that "[a]n agency may be informally created," and that "the question of whether an 'agency' existed is a question of fact." Rookard v. Mexicoach, 680 F.2d 1257, 1261 (9th Cir. 1982). See also McCollum v. Friendly Hills Travel Center, 172 Cal.App.3d 83, 92, 217 Cal.Rptr. 919, 924 (1985) (citing Rookard approvingly). The trial court's finding of fact as to the existence of an agency relationship is thus beyond challenge on this appeal. Defendant's fiduciary duty toward the Church flows, as a matter of law, from the fact of the agency relationship--for, in

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40. It is unclear whether the trial court, in applying its justification defense against intrusion, weighed the purported threat to defendant's physical safety in the balance. To the extent that it did, the prerequisites for applying the doctrine of physical self-defense were not even remotely established, as discussed at length in Section II.C. of this Brief.

41. Both claims are established by defendant's use of confidential information for unauthorized purposes. As discussed below, the claim of breach of fiduciary duty is also established by defendant's wrongful acquisition of the archives; and that wrongful acquisition defeats any privilege that defendant might otherwise claim to disseminate the documents.

California, an agent owes full fiduciary duties to his principal. Rookard v. Mexicoach, 680 F.2d at 1262; see also Restatement (Second) of Agency § 13 ("agent is a fiduciary with respect to matters within the scope of his agency.")

The facts established at trial--as found by the court below--unquestionably support the court's ruling that defendant breached these fiduciary duties. Defendant manifestly used "information confidentially given him by the principal ... to the injury of the principal" when he took documents from Church archives for his own use and supplied documents to known adversaries of the Church. Restatement (Second) of Agency § 395. Further, after the termination of the agency, defendant similarly used confidential information to the principal's injury and, by acquiring documents from Omar Garrison in the Spring and Summer of 1982, took "advantage of a still subsisting confidential relation created during the prior agency relation." Restatement (Second) of Agency, § 396(b), (d). He further breached his fiduciary duty by failing to return the documents after he left the Church and upon its demand that he do so. See England v. Doyle, 281 F.2d 304, 307 (9th Cir. 1960) (the "[p]roperty received by one in his capacity as agent is not his and the general rule is that the agent must deliver such property to his principal upon termination of the agency or the principal's demand") (applying California law).

The trial court's finding that defendant used plaintiffs' confidential materials for unauthorized purposes (App. 254), also clearly supports the court's ruling that plaintiffs established a prima facie claim of breach of confidence. See, e.g, Tele-Count Engineers v. Pacific Tel. & Tel., 168 Cal. App.3d 455, 462-63, 214 Cal.Rptr. 276, 279-80 (1985); Davies v. Krasna, 150 Cal.3d 502, 508-10 (1975); Faris v. Enberg, 97 Cal.App.3d 309, 158 Cal.Rptr. 704 (1979); Thompson v. California Brewing Co, 150 Cal.App. 2d 469, 474, 310 P.2d 436 (1957). See also Doe v. DiGenova, 642 F.Supp. 624, 632 (D.D.C. 1986) (The tort of breach of confidential relationship "consists of unconsented, unprivileged disclosure to a third party of non-public information that has been learned within a

confidential relationship") (citing Vassiliades v. Garfinckel's, 492 A.2d 580, 590-92 (D.C. App. 1985)).

In Carpenter Foundation v. Oakes, 26 Cal.App. 3d 784, 103 Cal.Rptr. 368 (1972), the court found both a breach of confidence and a breach of an agent's fiduciary duty under facts strikingly similar to those of this case. Defendant there was an adherent of the Christian Science religion and an agent of the plaintiff, which was a non-profit corporation whose function was to preserve archives of Mary Baker Eddy, the founder of Christian Science. A relationship of confidence developed over the years between defendant and plaintiff. Plaintiff provided defendant "substantial quantities of written and printed materials of varying kinds," including "voluminous correspondence from and speeches by Mrs. Eddy, memoirs and recollections of students who knew Mrs. Eddy, essays on Christian Science, press clippings photographs, diaries, notes, observations, pictures, poems, precepts, quarterlies, sermons, prayers and miscellaneous documents." Id. at 788.

Defendant was authorized to make the documents available only to serious students of Christian Science. Instead, he published two books consisting largely of excerpts from the documents. The court found that "defendant knew that the materials came into his hands for a limited and restricted purpose" and that, in using them for unauthorized purposes, he committed breaches of "trust and confidence," id. at 797, and "the requirements of a fiduciary." Id. at 791-92.

The analogy between Carpenter Foundation and this case is direct. Defendant here, as the defendant in Carpenter Foundation, came into possession of the archival material "by virtue of a relationship of agency, trust and confidence;" he received the documents with the knowledge that their authorized use was limited and specified; and he breached his fiduciary obligations by exceeding the scope of that authorized use.

2. The Justification Defense Relied On By the Trial Court is Inapplicable

The trial court ruled that defendant was privileged to breach his fiduciary duty because he reasonably believed that

doing so would help him defend himself, legally and physically. The court purported to find legal authority for this defense in two sections of the Restatement (Second) of Agency--which the California courts have never cited or relied upon--and in a forty-year-old decision of the California Court of Appeal.[42] As with the trial court's misinterpretation of the Restatement of Torts sections on intrusion, the court's reliance on selected and partial language from the Restatement of Agency neglects controlling doctrine stated in the Restatement itself and in the decisional law, and rests on a perversion of the policies underlying fiduciary and confidential obligations.

The practical implications of the court's novel defense are as anomalous and damaging in the broad area of fiduciary and confidential relations as in the area of privacy protections. It is not hyperbolic to say that permitting confidential employees to siphon the most sensitive private documents to their employers' adversaries, based on the employees' subjective assessment that is personally advantageous, would revolutionize the conduct of daily business operations. Such a rule is particularly absurd in cases, such as this, in which the fiduciary has ample time to resort to legal process for objective determination of whatever claim he has that his personal interests are threatened by his employer's conduct.[43] As discussed below, the courts and the Restatement, recognizing the untoward policy implications of a defense as broad as that applied by the trial court, have narrowly limited

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42. The trial court stated no rule of law and cited no legal authority affording a defense to plaintiffs' prima facie claim of breach of confidence. To the extent that the trial court intended to apply to that claim the same defenses it applied to the other claims, the defenses would fail for the same reasons discussed in connection with those claims. As discussed below, in the very specific contexts in which the courts have recognized a privilege to reveal confidences, the prerequisites for disclosure are extremely restrictive and are wholly inapplicable to this case.

43. The undisputed absence of circumstances amounting to a "necessity" for defendant's self-help is discussed at length in Point II.C. of this Brief.

the exceptions to an agent's fiduciary and confidential duty to his principal.

The trial court relied on the general language of comment f to Section 395 of the Restatement (Second) of Agency, which essentially restates the defense stated in Restatement of 418: "An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or of a third person."[44/] The trial court also cited the case of Willig v. Gold, 75 Cal.App.2d 809, 171 P.2d 754 (1946), for the proposition that "an agent has the right or privilege to disclose his principal's dishonest acts to the party prejudicially affected by them." However, the comments and cases under the Restatement, and the court's full analysis in Willig (none of which were discussed by the trial court) establish indisputably that an agent's privilege to reveal confidential information is inapplicable to the circumstances of this case--for at least five independent reason.

1. Comment b to Section 418 provides that "if the agent acquires things in violation of his duty or loyalty, he is subject to liability for a failure to use them for the benefit of the principal" (emphasis added). That is, the agent must prefer his principal's interests over his own in using documents he has wrongfully acquired. In this case, the facts--as found by the trial court--unquestionably establish that defendant breached his duty of loyalty in acquiring the documents. Section 396 of the Restatement provides that "after the termination of the agency, the agent ... has a duty of the

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44. It is extremely important to note that Restatement Sections 418 and 395, comment f, are not, in fact, "restatements" of actual common law decisions, but, rather, are wholesale creations of their drafters. The Restatement appendices indicate that no actual cases--in California or elsewhere--have rested on those Sections. As discussed below, the one decision that even considered applying the defense stated in Section 418 limited it to very narrow circumstances not present in this case; and the fundamental policies of agency law--recognized in the comments to the Restatement itself--compel such limited application.

principal not to take advantage of a still subsisting confidential relation created during the prior agency relation." Defendant indisputably took "advantage of a still subsisting confidential relation" when, having left the Church's employ in December 1981, he nonetheless later exploited his confidential relation with Omar Garrison in order to store and retrieve documents to be used against the interests of his former principal, the Church. Having acquired documents in clear violation of his duty of loyalty, defendant was required by Section 418, Comment b, to give preference to his principal's interests in using them.

For precisely the same reason, the trial court's reliance on Willig v. Gold 75 Cal.App.2d 809 (1946) is erroneous. In Willig the principal voluntarily admitted to the agent that he had defrauded a third party; and the agent then conveyed that information to the third party. The agent there thus acquired the confidential information without breach of any duty of loyalty.

2. The defenses stated in Willig and in the Restatement are inapplicable for still another reason. In this case, unlike Willig, defendant's defense rests not simply on the oral disclosure of the substance of his principals' allegedly wrongful acts. Rather, plaintiffs claim that even if defendant were privileged to report to others what he had learned as the Church's agent, he was not, in his fiduciary capacity, entitled to appropriate--or disseminate--the Church's confidential documents. That this distinction is crucial is recognized in Restatement (Second) of Agency § 396, comment b,[45/] which addresses the most often litigated type of unlawful disclosure of confidential information, namely, unauthorized use of customer lists:

> [A]lthough an agent cannot properly subsequently use copies of written memoranda concerning customers, which were entrusted to him or made by him for use in the principal's business, ... he is normally privileged to use, in competition with

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45. Section 396 addresses generally the duties of an agent after termination of the agency.

> the principal, the names of customers retained in his memory as the result of his work for the principal ... (emphasis added).

Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) (even though defendants were entitled to tell others about the private information they had seen and heard in plaintiff's den, they were not entitled to disseminate photographs and recordings embodying that information).

3. The Restatement Section 418 defense is inapplicable for yet another reason, which rests on the fundamental policy interest of encouraging "great freedom of communication between the principal and the agent." Restatement (Second), Section 395, comment a. That interest is of special importance in a case, such as this, in which the confidential information at stake is not simply routine commercial information, but is constitutionally protected "private" information. As discussed above, wholly apart from defendant's duties as a fiduciary, his unilateral seizure of appellant's private documents cannot be legally justified in the absence of immediate necessity. When defendant's common law fiduciary obligations are added to the privacy protections of the California constitution, the rule that defendant must show an absolute necessity for his unilateral appropriation of the documents is doubly required.[46/]

The only court that has ever so much as considered applying the defense stated in Restatement Section 418, rejected that defense on the precise grounds that in the absence of an emergency requiring "immediate action," there can be no justification for breach of fiduciary duty. Patrick v. Cochise Hotels, 259 P.2d 569, 572 (Ariz. 1953). In Patrick, the agent

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46. While, concededly, the requirement of an immediate necessity was not stated in the Willig case, it is important to note that that case was decided before the full flowering of California common law and constitutional law in the area of privacy and confidential interests. In any event, as discussed above, Willig did not address the requirements for permitting a fiduciary to disseminate written documents that he has wrongfully acquired--requirements that clearly must be more rigorous than in the case of oral conveyance of the substance of information rightfully acquired.

had a beneficial interest in a second mortgage on his principal's property. When the taxes on the property became overdue, the agent paid them with his own funds and declared the entire debt due under the acceleration clause of the second mortgage. The court ruled that the agent was not "privileged to protect interests of his own which are superior to those of the principal," because the taxes could have been paid by the principal within a week, rather than by the agent himself, without default. Id., at 572 (quoting Restatement). That is, "immediate action [was not] necessary" to protect the agent's interest in the property. Id. at 573 (emphasis added).

Similarly, in Tarasoff v. Regents, 17 Cal.3d 425, 441, 131 Cal.Rptr. 14, (1976), the court ruled that a psychiatrist, because of his special professional duties and skills, has a privilege and duty to disclose confidences only where "disclosure is necessary to avert danger to others," id. (emphasis added), and "where the risk to be presented thereby is the danger of violent assault." Bellah v. Greenson, 81 Cal.App.3d 614, 622, 146 Cal.Rptr. 535 (1978). As discussed below in Section II.C., the trial court's finding of fact do not even remotely establish the prerequisites for such a necessity privilege, even if it were applicable to one without professional skills and duties.

Thus, the "superior" interest of the agent--which triggers the Section 418 defense--clearly cannot be established by a defendant's mere subjective belief that his future personal advantage will be served. This is recognized in comment a to Section 418 itself, which states that only actual emergencies such as "illness" or "insurrection" permit an agent to breach his fiduciary duty--and, even then, only terminating the agency, not by affirmatively damaging the principal's interests through wrongful acquisitions and/or disclosures of confidential documents.

4. The trial court's justification defense is also in applicable because defendant's purported subjective belief was not that the documents were fruits or instrumentalities of crime or fraud, but merely that the documents might contain

circumstantial, hearsay evidence from an inference of wrongdoing might be drawn.

In Suburban Trust Co. v. Waller, 408 A.2d 758 (Md.App. 1979), the court addressed the question of whether a bank was justified in disclosing the confidences of a depositor because it believed that confidential documents contained evidence of wrongdoing. The court noted that "the American cases" on confidentiality are highly "restrictive," permitting disclosure only on consent of the plaintiff or under compulsion of legal process. Id. at 763-64. The court thus rejected any defense that "would permit a bank to decide what is or is not in the public interest to disclose, and what is or is not in the best interest of the bank to disclose. That vast area of discretion, it seems to us, transmogrifies confidentiality to the point that it bears little, if any, resemblance to its original meaning." Id. at 764.

The single narrow exception to this rule is where the confidential documents are "used as the instrument by which the crime itself was committed." State v. McCray, 551 P.2d 1376, 1379 (Wash. App. 1976) (emphasis added). That mere circumstantial evidence of unspecified and speculative wrongdoing may be contained in confidential documents has never been found to justify voluntary disclosure. Such expansion of the narrow privilege, as discussed above, would open a "vast area of discretion" that would "transmogrif[y] confidentiality" beyond recognition. Suburban Trust, 408 A.2d at 764.

This justification defense is even more absurd if grounded on defendant's subjective belief that some of the documents may contain evidence helpful to him or others in bringing or defending some anticipated civil lawsuit against his former principal. In the only judicial ruling in this area, the Second Circuit recently found that a former agent violated his fiduciary duty by supplying confidential information to private litigants who were adversaries of his former principal. ABKCO Music, Inc. v. Harrisongs Music Ltd., 722 F.2d 988 (2d Cir. 1983).

C. The Trial Court's Application Of The Doctrine Of Self-Defense To Plaintiffs'

Conversion Claim Is Erroneous As A Matter Of Law Because Defendant Neither Alleged Nor Introduced Evidence To Prove That He Was In Immediate Physical Danger When He Converted The Documents

1. Plaintiff and Intervenor Established a Prima Facie Case of Conversion

The trial court's ruling that plaintiff and intervenor established prima facie cases of conversion is indisputably correct. Upon leaving his position as Church archivist in December 1981, defendant purloined voluminous, commercially valuable archival material. In the Spring and Summer of 1982, he gathered up these materials and turned them over to Michael Flynn and other adversaries of the Church. These facts unquestionably make out a prima facie case of conversion under California law.

It is well recognized that the unauthorized use of personal property by an agent gives rise to a cause of action for conversion,[47/] as does a party's refusal to return property which was unlawfully acquired upon demand. See, 5 Witkin, Summary of California Law § 622; Prosser and Keeton, Torts, § 15. This principle is embodied in Restatement (Second) of Torts § 228:

> One who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated.

See also California Civil Code §§ 3379, 3380.

It is indisputable that defendant's appropriation of confidential and commercially valuable Church archives, his transfer of them to notorious adversaries of the Church, and his copying of them for his own use are "serious" departures from

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47. The trial court made a finding of fact that defendant was an agent of the Church.

the use he was authorized to make of them. The trial court so found as a matter of fact.[48]

Thus, when the Church gave formal notice by letter to defendant in May, 1982, he was under an obligation to return the documents. His failure to do so was a conversion.

2. The Doctrine of Self-Defense is Inapplicable Because Defendant Was Not in Immediate Physical Danger When He Converted The Documents

The trial court, in ruling that defendant established a defense to conversion, relied on a single legal authority applicable to that cause of action--Restatement (Second) of Torts § 261:[49]

> One is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose.

This Section is not even remotely applicable to the facts of this case. As detailed below all pertinent sources of legal authority--the decisional law of the California courts and the United States Supreme Court; the Restatement (Second) of Torts; and leading commentators--speak unanimously in applying the doctrine of self-defense only where a defendant is faced with a present and immediate danger of physical injury. The defense is inapplicable if the apprehended danger is either past or lies in the indefinite future--even the near future. The

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48. The question whether a misuse of chattel is serious enough to constitute conversion is a question of fact. See John R. Faust, Distinction Between Conversion and Trespass to Chattel, 37 Ore. L. Rev. 256, 261 (1958). Even if the trial court had not found that defendant's misuse of the archival material was "serious" enough to constitute conversion, defendant is undoubtedly liable for trespass to chattel. Section 217(b) of the Restatement (Second) of Torts states that a trespass to chattel is committed by one who intentionally "us[es] or intermiddl[es] with a chattel in the possession of another."

49. The trial court's Statement of Decision mis-cited this Section as § 271.

requirement of a present and immediate assault is rooted in the most fundamental rationale of the self-defense doctrine, which is well-summarized by Prosser and Keeton:

> "The privilege of self-defense rests upon the necessity of permitting a person who is attacked to take reasonable steps to prevent harm to himself or herself, where there is no time to resort to the law." Prosser and Keeton, Torts. (5th Ed. 1984) at 124. (emphasis added)

Thus, just as the specific policies underlying the torts of intrusion and breach of fiduciary duty require an immediate necessity to justify defendant's unilateral decision to invade plaintiffs' rights, so does the policy underlying the tort of conversion.

The facts of this case, as found by the trial court, establish at most that defendant feared for his safety at some indefinite future time. More particularly, defendant did not introduce a shred of evidence to prove that he apprehended present and immediate assault at the points in time pertinent to the conversion claim--in December 1981 when he took the documents from the Church; at the various points in the Spring and Summer of 1982 when he acquired them from Mr. Garrison's storage; and in May 1982, when he failed to respond to the Church's demand letter. Indeed, the protracted and ongoing nature of defendant's conversion itself definitely contradicts any claim that he took them to defend himself against a present assault at any given point in time. Certainly, he did not face incessant assailants over a period of several months. To the contrary, there is no evidence that he faced any assailants at any time during the period he converted the documents.

a. As stated in Restatement § 261, the self-defense doctrine is a defense of conversion under the same conditions as it is a defense to assault. Thus, as stated in Comment b to Section 261, the defense obtains only when there is reasonable apprehension of immediate "confinement or a harmful or offensive contact to the actor." Comment a to Section 261 refers us to Sections 63-76 for further elaboration of the doctrine of self-defense. Comment g to Section 63 states, in turn, that the privilege "extends only to acts which are done for the purpose

of protecting the actor from a presently threatened aggression." (Emphasis added). Similarly, comment k to Section 63 states that the privilege exits "only when the other actually apparently threatens an immediate attack upon" the defendant. (Emphasis added.) Comment k further states,

> "[T]here is no privilege to disarm another who threatens a future attack upon the actor or otherwise to disable him from carrying his purpose into effect, since there is always the chance that the other may abandon his purpose, and if he does not, that the actor will have an opportunity of repelling the attack when it becomes imminent."

The courts have uniformly followed the principles stated by Prosser and the Restatement. In the early case of Acers v. United States, 164 U.S. 388, 391 (1896), the Supreme Court upheld a jury charge on self-defense which instructed that the apprehended danger "could not be a past danger, or a danger of a future injury, but a present danger." This rule requiring a present and immediate danger of bodily injury has been consistently followed by the California courts. E.g., People v. Flannel, 25 Cal.3d 668, 676, 160 Cal.Rptr. 84 (1979) (must be reasonable belief "of imminent peril to life or great bodily harm") People v. Shade, 185 Cal.App. 3d 711, 230 Cal.Rptr. 70, (1986) (must have honest and reasonable fear of imminent danger and must have acted solely under influence of such fear); Villines v. Tomerlin, 206 Cal.App.2d 448, 452, 23 Cal.Rptr. 617 (1962) (must be reasonable belief "in an impending attack . . . or immediate damage to his property"); Boyer v. Waples, 206 Cal.App.2d 725, 727, 24 Cal.Rptr. 192 (1962) (act must be "necessary"); People v. Cornett, 93 Cal.App.2d 744, 209 P.2d 647, 650 (CA 4, 1949) (act must be so "urgent and pressing" as to be "necessary"); People v. Fitch, 28 Cal.App.2d 31. 44 (1938) (must be "immediate danger" of bodily harm). See also People v. Lucas 160 Cal.App.2d. 305, 324 P.2d 933 (1958) (danger must be imminent, and a mere fear that danger will become imminent is not enough); State v. Schroeder, 103 Kan. 770, 176 P. 659, 660 (1918) (fear of injury "at some future time" does not justify act of self-defense, even where other party made threats immediately before the act and there were prior assaults "a few

days before" the act.) In what Prosser cites as an "excellent" review of the law of self-defense, the rule is affirmed: "The danger must be, or appear to be, pressing and urgent. A fear of danger at some future time is not sufficient." R.M. Perkins, Self-Defense Re-Examined, 1 UCLA L. Rev. 133, 134 (1954).50/

b. Moreover, even if defendant had introduced evidence showing a present and immediate assault, he introduced none to show that the means he employed were the only and necessary means of avoiding physical danger. Restatement (Second) of Torts, § 70, comment b, states that the actor must correctly or reasonably "believe that the means which he applies are necessary to prevent the apprehended harm and not merely that they are likely to be effective in preventing it." (Emphasis added). See also People v. Clark, 130 Cal.App.3d 371, 377, 181 Cal.Rptr. 682, 686 (1982) (only an act "which is necessary in view of the nature of the attack" may be used in self-defense) (emphasis added); Boyer v. Waples, supra (same).

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50. For almost identical reasons, "public necessity" and "private necessity" defenses are likewise inapplicable to this case. See Restatement (Second) of Torts §§ 262, 263. The "public necessity" defense requires that a public catastrophe be "imminent" and "impending," id. § 262 comments b, c, that action to avert it be "necessary," id. § 262 and Appendix; and that the threatened disaster be to public health, including "conflagration, flood, earthquake, or pestilence." Id., comment b. Thus, any claim by defendant that he sought to serve the public interest by exposing alleged wrongdoing within the Church fails even remotely to approach the kind of present public catastrophe required to invoke the public necessity defense. In any event, the trial court found only that defendant was motivated by alleged fear of generalized personal danger and of private litigation, neither of which implicates any public interest, catastrophic or non-catastrophic.

The "private necessity" defense, like the doctrine of self-defense, rests on the principle that self-help is permissible only when there is "no time to resort to the law," Prosser and Keeton, Torts (5th ed. 1984) 131--that is, only under circumstances "creating the necessity for immediate action." Restatement (Second) Torts § 197, Appendix (incorporated by reference in § 263, Appendix) (emphasis added). In any event, even if the Restatement "private necessity" privilege were applicable, it cannot defeat plaintiff's damage claim, since Section 263(2) states that defendant remains liable "for any harm caused by the exercise of the privilege."

Certainly, no reasonable mind could believe that taking a party's documents is a certain or necessary way to effectively avoid physical harm at the hands of that party.

c. Although the trial court's reasoning is not entirely clear, the court seems to have invoked the Section 261 doctrine of self-defense on the basis of defendant's alleged fear of a lawsuit as well as his generalized fear of physical harm. Fear of potential litigation--even if the fear were reasonable--does not even remotely establish the predicate for invoking the self-defense doctrine. As the discussion above makes clear, defendant must have reasonably apprehended present and immediate bodily injury.

3. Good Faith Motives--Even if Aimed at Serving the Highest Constitutional Values--Do Not Justify Conversion

It is hornbook law--in California and other jurisdictions--that conversion "is an instance of strict liability in which care [and] good faith . . . will not save the defendant." Beverly Finance Co. v. American Gas. Co. of Reading, Pa., 273 Cal.App.2d 709, 78 Cal.Rptr. 334, 337 (1969). See also Edwards v. Jenkins, 214 Cal. 713, 721, 7 P.2d 702 (1932); Krusi v. Bear, Stearns & Co, 144 Cal. App. 3d 664, 192 Cal.Rptr. 793, 798 (1983) ("good faith [and] due care . . . may not be set up as a defense" to conversion.) As stated in Prosser and Keeton on Torts (5th ed. 1984) at 92, the intent required for an act of conversion is simply "an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiffs' rights," entirely irrespective of the motivation for so doing.

In California Grape Control Board. v. Boothe Fruit Co., 220 Cal. 279, 29 P.2d 857, 858 (1934), defendant interposed as a defense to his conversion of plaintiff's grape crop the allegation that plaintiff intended to violate state law by allowing the grapes to wither on the vine. The court rejected the defense:

> The property belonged to [plaintiff]; [defendant] converted it. How [plaintiff] obtained it or what use it intended to make of it can be no justification for the acts of [defendant]. Property rights are not

> administered according to speculation as to the purpose for which the property is intended to be used.

Indeed, as quoted supra, in the leading case applying California law, the Ninth Circuit stated that even a reasonable motive serving the highest constitutional values cannot constitute a defense to conversion. Dietemann, 449 F.2d at 249. Thus, even if defendant reasonably suspected that the documents at issue contained evidence of frauds or crimes that would be useful in anticipated litigation, he was not thereby entitled to convert them--whether in the name of his private interest or of some imagined public interest.

POINT III

THE PRESENT ACTION REMAINS COGNIZABLE, BOTH ON APPEAL AND ON REMAND, IF NECESSARY

As stated supra, at 8, the combined effect of the stipulation and the indemnity agreements reached by the parties during settlement proceedings effectively limits the amount of damages plaintiffs may receive from defendant to one dollar, an amount deemed nominal by the courts. See e.g., Avina v. Spurlock, 28 Cal.App.3d 1086, 1089-90, 105 Cal.Rptr. 198, 200-01 (1972).

Where a plaintiff "has sued only to establish a right or to obtain a ruling by a court that defendant's conduct was tortious," an award of nominal damages is appropriate. Restatement (Second) of Torts, § 907, comment (b). Indeed, under California law, "[a] judgment is erroneous in failing to grant nominal damages . . . if nominal damages would . . . carry costs or determine some question of permanent right." Staples v. Hoefke, 189 Cal.App.3d 1397, 1407, 235 Cal.Rptr. 165, 171 (1987) (emphasis added), citing Sweet v. Johnson, 169 Cal.App.2d 630, 633, 337 P.2d 499 (1959). See also Hotel & Restaurant Emp. v. Francesco's B., 104 Cal.App.3d 962, 973, 164 Cal.Rptr. 109, 115 (1980), citing Ca. Civ. Code § 3360 ("[w]hen a party is injured by the intentional act of another, constituting a breach of duty owed to the party by the other, then, even though the party may suffer no appreciable detriment (i.e. sustain actual

damages), the party is entitled to nominal damages") (original emphasis); Avina v. Spurlock, 28 Cal.App.3d 1086, 105 Cal.Rptr. 198, 200 (1972) (nominal damages should be awarded even if plaintiff suffered no loss or injury where the law still recognizes an invasion of plaintiff's right or a breach of defendant's duty). See also 6 Witkin, Summary of California Law § 1317 (1988) (When an action is brought to vindicate a legally protectable right or interest, nominal damages are appropriate) (citing Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042 (1978)).

The judgment and memorandum of decision in this case throw into question the continuing privacy and property rights of the plaintiffs, as well as the good name and reputation of the Church. The decision below has been invoked against the Church by litigants throughout the country to support allegations similar to those contained in dicta in the memorandum of decision, even though, as we have shown in Point I, supra, the dicta were based upon "evidence" admitted solely to show Armstrong's state of mind, and not for its truth. The most unfair and dramatic example of this was the trial court's unqualified "diagnosis" of Mr. Hubbard and the Church itself as paranoid and schizophrenic, based upon "state of mind" evidence that the plaintiffs were not even permitted to counter because the truth of the testimony supposedly was not even an issue.

The plaintiffs preserved their right to appeal from the judgment and decision below precisely to counter the continuing adverse consequences the decision and judgment continue to have on their privacy, property and other rights. As developed in Point II of this brief, plaintiffs seek a ruling that defendant's activities were unjustifiably tortious. They also seek to establish on appeal that the trial court improperly created unprecedented and deeply flawed common law justification defenses to defeat plaintiffs' prima facie claims of invasion of privacy, breach of fiduciary duty, breach of confidence and conversion. Finally, as developed Point I, plaintiffs seek reversal in light of the trial court's massive evidentiary errors which served to deprive plaintiffs of a fair trial.

These claims clearly involve plaintiffs' legally protectable rights and directly implicate questions involving defendant's breach of duty. Thus, plaintiffs have a cognizable interest in pursuing their claim in the courts.

As a practical matter, were this court to reserve the judgment below, there would be no need for a retrial. Given that plaintiffs now seek only nominal damages, the Superior Court would simply enter judgment in plaintiffs favor in the amount of one dollar.[51]

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51. It should be noted that remand to the Superior Court would be entirely proper, notwithstanding the requirement that any cause in the Superior Court must surpass the monetary limit of $25,000 to obtain jurisdiction. See CCP 86(a)(1), as amended, 1985; Cal.Const., Art. VI, § 10. This is because the doctrine of continuing jurisdiction advises that "the prayer determines jurisdiction, and jurisdiction once attached continues throughout the proceeding...[J]udgement for less than the jurisdictional amount will not oust the court of jurisdiction previously acquired." 2 Witkin, Cal.Proced. (3d ed.) § 19 (1985 & supp. 1989.) See also Maloney v. Maloney, 67 C.A. 278, 280, 154 P.2d 426 (1944); (People v. Argonaut Ins. Co., 71 Cal.App.3d 994, 139 Cal.Rptr. 795 (1977).

However, if in light of the nominal damages presently at issue, this Court determines that the case should be transferred to Municipal Court pursuant to CCP § 396, see Omni Aviation Managers, Inc. v. Municipal Court, Los Angeles, J.D., 60 Cal.App.3d 682, 684-5, 131 Cal.Rptr. 758, 760 (1976), that court equally can enter judgment for one dollar.

CONCLUSION

For the reasons discussed above, this court should reverse the trial court's judgment, and remand for entry of judgment for plaintiffs in the amount of one dollar.

DATED: December 20, 1989

Respectfully submitted,

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STATE OF CALIFORNIA)
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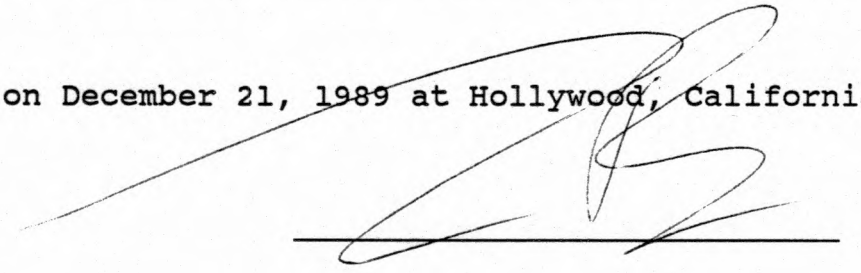
I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Blvd., Suite 2000, Hollywood, CA 90028.

On December 21, 1989, I caused to be served the foregoing document described as APPELLANTS' BRIEF; APPELLANTS' SUPPLEMENTAL APPENDIX IN LIEU OF CLERK'S TRANSCRIPT on interested parties in this action, to the persons and addresses attached.

If hand service is indicated on the attached list, I caused the above referenced paper to be served by hand, otherwise I caused such envelopes with postage thereon fully prepaid to be placed in the United States mail at Hollywood, California.

Executed on December 21, 1989 at Hollywood, California.



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